85-6461

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ORIGINAL

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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4 Opp

NO. _____

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OCTOBER TERM, 1985

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EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Earline Martin, moves this Court for an Order permitting her to proceed in this Court in forma pauperis with her Petition for Writ of Certiorari to review the judgment and final order of the Supreme Court of Ohio (State v. Martin, 21 Ohio St. 3d 91 [January 15,1986]). The petitioner's separate affidavit in support of this Motion is attached hereto.

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Cleveland, Ohio 44114
(216) 523-1100

IN THE UNITED STATES SUPREME COURT

EARLINE MARTIN

vs. NO. _____

STATE OF OHIO

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, Earline Martin, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are set forth in the Petition for Writ which will be forwarded to the Court. These we incorporate by reference.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No.

   Date of last employment: November, 1980.

   Amount of salary and wages per month which you received: $800.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No dependents.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Earline Martin
EARLINE MARTIN

SUBSCRIBED AND SWORN TO before me this 24 day of July 1986.

Sheila S. Bowman
NOTARY PUBLIC

Sheila S. Bowman, Notary Public
[illegible] County, [illegible]
My commission expires 6-23-[illegible]

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I

Where the facts show an accused was victimized by a prosecutor's egregious summations the question as to whether the remarks made deprived the accused of a fair trial cannot be subordinated by a reviewing court to the mere mechanical inquiry as to whether they "are convinced beyond a reasonable doubt, that even absent the prosecutor's statements, the jury would have found" the accused guilty.

II

Whether due process is violated when the jury may have been misguided by conflicting instructions and one (or more) of the instructions is a prejudicially incorrect statement of the law.

III

Whether due process is denied when the trial judge instructs the jury in categorical language that only if they found the accused not guilty of the charged offense (here aggravated murder) should they even consider any lesser included offenses and if they found the accused guilty of such offense they need not consider any lesser charge.

IV

Can a State constitutionally require an accused who defends against a murder charge on the grounds of self-defense to prove themselves not guilty.

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OCTOBER TERM, 1985

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EARLINE MARTIN,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Earline Martin, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, which judgment was rendered and became final on January 15, 1986.

OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Ohio, the judgment to which this Petition is directed, is set forth as Appendix "A" to this Petition. It is also formally reported as State v. Martin, 21 Ohio St. 3d 91 (1986).

The Journal Entry and Opinion of the Ohio Court of Appeals, dated November 21, 1984, is designated Appendix "B".

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on January 15, 1986. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are:

(1) Fourteenth Amendment, United States Constitution.

(2) Revised Code of Ohio, §2901.05.

(3) Revised Code of Ohio, §2903.03.

(4) Revised Code of Ohio, §2929.71.

STATEMENT OF THE CASE [1/]

Earline Martin was found guilty, by a jury, "as charged by the Judge" of Aggravated Murder (under favor of R.C. of Ohio, §2903.01 and §2929.71) and was given a life sentence. The appeal on questions of law from the verdict and final order entered by the trial court resulted in an affirmance of the conviction.

The facts in this cause, as distilled by the Ohio Supreme Court, show that:

> On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.
>
> Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim had struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.

1/ References to the transcript of proceedings will be designated by the prefix "R".

> Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder.

Appendix "A", infra, at A 1 - A 2, 21 Ohio St. 3d, at 91-92.

Additionally the facts show the Supreme Court of Ohio credited our contention that "the prosecutor's remarks in closing argument, characterizing ... [petitioner's] testimony as a fabrication, were substantial prejudicial error" (id., at A 5 and 95). The Court then rather typically concluded, in effect, that the fundamentals of a fair trial need not be observed by prosecutors if they are convinced a reviewing Court will find sufficient proof in the Record to support a finding of guilt. This idea the Court validated by resolving itself into an appellate jury and then determining on this Record "that even absent the prosecutor's statements, the jury would have found ... [her] guilty" (ibid).

The Record also shows the trial court, despite our very precise objections and exceptions, instructed the jury that the defendant, to prevail on the basis of her self-defense plea, was required to actually prove her innocence. Indeed as the self-defense arguments made below (which have the support of the two dissenting Justices of the Ohio Supreme Court and one of the three judges on the Court of Appeals) make most clear, the instructions herein being assailed simply cannot be defended.

As to the other flawed instructions, dealing with the inter-relationships between the aggravated murder charge and its included offenses, the contention will be made that they were not only confusing and unintelligible, they were also contradictory.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

History could very well record, if it happens, that the selection of this particular case to resolve the issues here involved was, both, wise and timely. For the issue as to whether a State can require an accused to prove their innocence when they defend solely on the grounds of self-defense will not go away simply because the Ohio Supreme Court, in a five to two decision, has apparently satisfied itself that such is the case.

Moreover, the aptness of this Court's selection of this particular case will be applauded by those of us who are convinced the Ohio Supreme Court and its various Appellate courts (including the one below) are dead wrong in their analysis of these issues. Indeed, the majority's reliance on State v. Moran, ___ U.S. ___, 105 S. Ct. 350 (1984), is really a godsend because of the misguided focus it gives to our self-defense arguments. Significantly, the Court of Appeals specifically recognized that it had already "dealt with a nearly identical [issue] in State v. Moran, No. 45879...." (See Appendix "B", p. A 11). And the Supreme Court of Ohio specifically cited Moran in support of its ultimate thesis (Appendix "A", at A 4 and State v. Martin, 3 Ohio St. 3d at 94), which fact should weigh heavily in favor of the granting of this Petition.

It was, of course, in Moran v. Ohio, ____ U.S. ____, 105 S. Ct. 350 (October 29, 1984), that counsel apparently got the attention of some of the members of this Court. For it was here that Justice Brennan, in a dissent from the denial of certiorari, articulated an analysis of this issue that can be favorably compared to that urged in the various dissenting opinions rendered in the reviewing courts below. It is substantially this same position that the petitioner has taken in her discussions of these issues below.

While no abridgement of the specific analysis can do it justice, the following selected segments from Moran seem especially apt:

> The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code §2903.01(a) (1982). Under Ohio law, an assertion of self-defense requires proof inter alia that the defendant "was in imminent danger of death or great bodily harm." State v. Robbins, 58 Ohio St. 2d 74, 74, 388 N.E. 2d 755, 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design."
>
> On a slightly broader reading of Patterson, sources of Ohio law outside its murder statute may be relevant in determining what elements constitute the crime of aggravated murder in that State. In Engle v. Isaac, 456 U.S. 107 (1982), respondents sought to review the denial of their habeas petitions, in which they raised virtually the identical claim raised by petitioner here.
>
> * * *
>
> To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted of an immediate response to a murderous attack upon him. See Patterson, supra, at 210; Solem v. Helm, ___ U.S. ___ (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge -- an element required by the Constitution even if not by the State's enacted or decisional law.

Moran v. Ohio, 105 S. Ct., at 354-355. (Dissenting Opinion.)

When we add to the above quote the Court's recent decision of Francis v. Franklin, ____ U.S. ____, 105 S. Ct. 1065 (April 29, 1985), which makes an analysis similar to the ones made in the Moran dissent and by the dissenting Judges on the Courts below, the die seemingly has been cast in favor of an outright repudiation and rejection of the self-defense theories espoused by the majorities below.

Also, this Court is being called on to reject the equally flawed analysis relied on by our reviewing courts in their defense of all the various instructional issues discussed below.

ARGUMENT NO. I

When Addressing A Showing That An Accused Was Victimized By A Prosecutor's Egregious Summation, Which Was Expressly Approved By The Trial Judge, The Question As To Whether The Remarks Made Deprived The Accused Of A Fair Trial Cannot Be Subordinated By A Reviewing Court To The Mere Mechanical Inquiry As To Whether They "Are Convinced Beyond A Reasonable Doubt, That Even Absent The Prosecutor's Statements, The Jury Would Have Found" The Accused Guilty.

It is the law everywhere, including Ohio, that the prosecutor is barred from expressing his or her personal opinion on any of the issues in the case, including credibility. See, State v. Thayer, 124 Ohio St. 1 (1931) and State v. Smith, 17 Ohio St. 3d 13 (1984).

This is so because when a prosecutor asserts her personal beliefs as to the credibility of the accused, as was done here with the Judge's express approval, such comments impinge on the jury's function of determining the guilt or criminal liability of the accused. Also, comments of this ilk inject into the case irrelevant and inadmissible matters and considerations not legally produced as evidence. When viewed in this sense, it is apparent that by expressing her opinions and beliefs, the prosecutor sought to increase the apparent probative force of the State's proof by virtue of her personal influence, her presumptive superior knowledge of the facts and background of the case, and the influence of her official position. See 5 Wharton, Criminal Law and Procedure, §2084 (R. Anderson Ed. 1957); 6 Wigmore, Evidence, §1806 (3rd Ed. 1940); Anno, 50 American Law Review, 2d 766 (1956).

All this being so, the prosecutor's argument that Earline Martin had actually lied in her own evidence (R. 651) and was a "liar" (R. 652) clearly suggested that the prosecutor had some private information supporting her unequivocally stated beliefs. Further, we contend that where (as here) the transgressions involve the prosecutor, what is required is a stricter adherence to the proper side of the line than might otherwise be the case because the chances of prejudice are surely greater.

Clearly, because the prosecutor as a public official occupies an exalted position, when they are allowed to testify as this prosecutor did in her summations, the jurors are convinced they actually heard "expert" testimony by one of their public officials on some of the most significant issues in the case. In assaying our discussion of this issue, consider the A.B.A. Code of Professional Responsibility, DR 7-106 (C), which provides in pertinent part that:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * *
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

Applying these concepts to the acts here being condemned, it is our considered judgment that the prosecutor wilfully sought, and succeeded by this type of an argument, a conviction based on the jury's repose of confidence in her own private beliefs and opinions. This circumstance was aggravated by the rather remarkable attitude of the judge. Here we refer again to the

trial judge having subordinated his duty to insure that those on trial receive a fair trial to the prosecutor's penchant for ignoring certain basic rules of fairness. In this regard, see A.B.A. Standards, The Functions of the Trial Judge, 5.10, dealing with final arguments.

Our citing the above Standard emphasizes the mal-effect of the trial Judge's rejection of our objections to the prosecutor's characterization of our petitioner. This point becomes most compelling in the light of the wrongs rectified in the opinion of State v. Thomas, 33 Ohio App. 2d 7, affirmed 36 Ohio St. 882 (1973). In Thomas, it was recognized the trial judge's responses to objections can influence a jury's assessment of a witnesses' credibility. Here Earline Martin was the key witness in support of her defense, which further aggravates this situation. See United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

The response of the Supreme Court of Ohio to the above insuperable contentions was to remit this petitioner to the comfort of knowing the Judges of that Court had satisfied themselves from a reading of the cold Record, as a sort of appellate (or substitute) jury, that she would have in any event been found guilty. In other words, the fact that her credibility was totally destroyed by an argument the prosecutor had to know (and the trial Judge should have known) was wrong could be overlooked because they decided the jury would have in any event agreed with the prosecutor that she was lying in her evidence.

Aside from the fact that allowing a prosecutor to indulge in this type of gamesmanship was totally wrong, the further fact that these gross acts were directed at the heart of our petitioner's defense makes for an additional argument of compelling significance. Here we refer to the fact that the power of a jury to acquit "right in the teeth of both the law and

the facts", Horning v. District of Columbia, 254 U.S. 135, 138 (1920), was certainly a consideration that has so far been ignored here. This follows because jurors are simply not bound to follow what appears to be inescapable logic to appellate judges and prosecutors.

Given the above analysis, it seems clear enough from the harmless error position taken by the Ohio Supreme Court that they are now convinced the fundamentals of a fair trial need not be respected, indeed can be avoided with virtual impunity, if the proof persuades them of a defendant's guilt. What really punctuates the Ohio Court's flawed resolution of this issue is its mild reproofs of the prosecutor for her improper arguments, which were at least recognized by them as such (Appendix "A", at A 6 and Martin at 96). The same is true of the Court's total failure to credit the impact of the trial judges open and emphatic blessing of the remarks themselves.

In our view, the conclusion is inescapable that the jury may have gotten the impression from the judge's approval of these statements that the Court considered the prosecutor's tactics in this regard to be, both, necessary and proper.

Since the petitioner's credibility was absolutely vital to the persuasiveness of her self-defense evidence, one has to wonder how it could be said the prosecutor's argument that was made for the sole purpose of destroying the petitioner's credibility was harmless.

ARGUMENT NO. II

Where The Jury Is Given Conflicting Instructions And One (Or More) Of The Instructions Is A Prejudicially Incorrect Statement Of The Law, Due Process Is Violated Since The Jury May Have Been Misguided Thereby.

As argued below (Post, pp. 17 to 19) instructing the jury that they could not consider a lesser included offense unless they acquitted the accused of the higher offense was clearly wrong and indefensible (Keeble v. United States, 412 U.S. 205 (1973), Beck v. Alabama, 447 U.S. 625 (1980). On the other hand, and in amplification of the arguments referred to, we do concede the Court of Appeals isolated a segment of the overall charge, which they dubbed as being correct. This instruction was then said to have cleansed the entire charge.

Here it should be specifically noted that the trial court included in its instructions the following specific directions:

> If you find, ladies and gentlemen, that the State proved beyond a reasonable doubt all essential elements of aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense.
>
> If you find that the State failed to prove that the offense was done with prior calculation and design, but that the offense was nonetheless purposely caused, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser offense of murder. [R. 692-693.]
>
> * * *
>
> If you find that the State proved beyond a reasonable doubt all essential elements of the lesser crime of murder,

> your verdict must be guilty of murder and in that event, you will not consider any lesser offense.
>
> If you find that the State failed to prove any of the essential elements of the offense of murder, you must find the Defendant not guilty of murder and you will proceed with your deliberation and decide whether the State has proved beyond a reasonable doubt the essential elements of the lesser offense of voluntary manslaughter. [R. 693-694.]
>
> * * *
>
> Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter. (R. 698-699.)

The standard that must be used (and obviously was not used by our reviewing courts) in evaluating the constitutional challenge to these various instructions is whether a reasonable juror could have interpreted the given charge in a way, or fashion, inconsistent with the Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). This is so because a charge susceptible to such an interpretation by a reasonable jury so infects the trial at which it is a part that a conviction rendered subsequent to such charge cannot withstand due process attack, Cupp v. Naughton, 414 U.S. 141, 147 (1973). Thus even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, Leary v. United States, 395 U.S. 6, 31-32 (1969), it simply cannot be assumed this is actually what happened. Yet, our Supreme Court made the following specific determination in resolving this case against the petitioner:

> If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury

> has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Appendix "A", p. A 5, 21 Ohio St. 3d at 95.

The most patent errors in the above charges were precisely dealt with in our Court's decision in State v. Muscatello, 57 Ohio App. 2d 2310, Aff'd 55 Ohio St. 2d 201 (1978). Indeed, in Muscatello the Court specifically declared that it is prejudicially improper to instruct the jury that it must unanimously agree the accused is not guilty of aggravated murder before considering a lesser charge. State v. Muscatello, supra. Given this tenet, the State reviewing courts should have been hard pressed to even suggest that the instructions here being referred to could be regarded as harmless error beyond a reasonable doubt. Yet such is the impact of their decisions.

What emerges from any meaningful analysis of the various instructions here being centralized is that (even when they are read in the light of all the instructions given) they contain fatally serious flaws and self-contradictions. And, we know that self-contradictions within a judge's charge can never be harmless error. Again this follows because it is simply impossible to be certain the jury only followed and only relied on the "correct" segments of the instructions. See United States v. Walker, 677 F.2d 1014, 1016 n.3 (4th Cir. 1982), a case where the points made therein should be applied here full strength.

Despite the cogency of the above analysis it seems rather clear, to us at least, that the Court of Appeals somehow missed its thrust by convincing itself the segment of the charge it isolated, Appendix "B", infra, at p. A 10 fn. 1, (which arguably contained a correct statement of the law) did not give rise to any possibility for confusion even when considered in the light of the various inconsistent and contradicting segments that were

also in the charge. In our view, no court (including the Courts in Ohio) can rightly assume, with impunity, that a "lay jury will know enough to disregard the Judge's bad law if in fact he misguides them." Bollenbach v. United States, 326 U.S. 607, 613-614 (1946).

The outcome of this case turned in no small measure on the jury's understanding of the Court's jury instructions. Our Court of Appeals was content in finding no prejudice to the defendant because, in their judgment, the segment of the instruction isolated by them was said to be a correct exposition of the law. Significantly the Appellate Court failed to even articulate any recognition of the fact that their preferred segment of the Court's charge conflicted with other segments thereof. And, just as surely, they did not reckon with the fact that the jury could very well have followed those segments of the trial Court's charges which improperly told them not to consider the lesser included offenses (of murder and manslaughter) if they found the defendant guilty of the higher offense.

In our judgment, although obviously such is not the opinion of Ohio's Appellate Courts, telling the jury (as the trial judge did) that "if you find ... that the State proved ... aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense" simply cannot be defended in law, logic or commonsense. Yet, the Ohio Supreme Court's response in this case was to oraculate that despite these catagorical instructions, which were clearly flawed, it could be assumed the jury proceeded correctly. Appendix "A", p. A 5, 21 Ohio St. 3d, at 95.

Our point here is really made by assigning, for analysis, the definition of murder plus mitigation to manslaughter (i.e., proof the accused was "under the influence of sudden passion or

sudden rage"). When viewed in this sense, telling the jury, as our Judge did, that if they found the defendant's act amounted to that of aggravated murder they should go no further, had the unavoidable effect of actually preventing the jury from giving due consideration to those additional, extenuating circumstances in the evidence that characterize manslaughter. The upshot of this is that the given instructions actually deprived the jury of a choice between murder and manslaughter.

This analysis leads inexorably to the conclusion that even if the Court had correctly charged the jury in the one segment of its charge isolated by the Appellate Court, with reference to the sequences involved in dealing with an aggravated murder charge and its lesser included offenses; the trial Judge having also given the jury a clearly erroneous instruction (one that told them not to even consider the lesser charge if they found guilt of the greater, as argued elsewhere in this petition) was a due process violation. Sandstrom v. Montana, supra.

This follows because even assuming the jury understood those segments of the Court's charge that dealt with the relationship of manslaughter to murder, it is extremely doubtful they perceived Earline Martin could have been guilty of voluntary manslaughter even if the State first proved she purposely caused the death of the decedent. This, of course, would be so if the evidence also showed the killing under those circumstances that make for a voluntary manslaughter offense.

Postured by these circumstances one must ask: is it even possible to conclude our jury (despite being told if they found the State proved all the elements of aggravated murder or murder the verdict should be rendered at that point [R 692-693] and that they should only look to see if some lesser charge was committed if they find her not guilty [ibid] or they were unable to agree

she was guilty of such offense [R 693-694]) nonetheless considered and rejected these lesser charges. Yet, this is precisely what the Supreme Court of Ohio actually held in this case, Appendix "A", p. A 4 - A 5, 21 Ohio St. 3d, at 94-95.

Hopefully, this Court will surely agree that where the evidence would support a verdict of both murder and manslaughter, the jury must be given the right to make the choice. Further, we know that in situations when a trial court fails to instruct on manslaughter, or any other lesser charges (where such an instruction is warranted), thus eliminating the element of choice from the jury's consideration, the accused must be given a new trial. So why not in this case?

In our view, the situation here is analogous to those cases where the trial court fails to instruct on the lesser charges when he should do so. When viewed in this sense, the jury instructions here being centralized must also be regarded as having had the unpardonable effect of eliminating, or taking away, from the jury the elements of choice by de-emphasizing the manslaughter and the other lesser charge. This deprived the petitioner of her right to have the jury make a choice in a situation where the evidence could have supported lesser charges. For this reason too, Earline Martin is entitled to a new trial.

ARGUMENT NO. III

Due Process Is Denied When The Trial Judge Instructs The Jury In Categorical Language That Only If They Found The Accused Not Guilty Of The Charged Offense (Here Aggravated Murder) Should They Even Consider Any Lesser Included Offenses And If They Found The Accused Guilty Of Such Offense They Need Not Consider Any Lesser Charge.

The Supreme Court of Ohio aptly posturing aspects of the issues here being raised credited the trial court with having instructed the jury "that it should not consider any lesser included offense if the jury first found the state had proved ... all of the elements of the offense of Aggravated Murder ....," State v. Martin, 21 Ohio St. 3d 91, at 92 (1986), Appendix "A", infra, p. A 2. Actually the given instructions were even stronger than that. For the jury was given what can only be viewed as mandatory directions with reference to the choices open to them. For here the Record also shows the trial court interspersed, intertwined and intertwisted, throughout his self-defense instructions, such unequivocal statements as:

> (a) "if you find ... that the state proved ... Aggravated Murder, your verdict must be guilty of that offense and in that event you will not consider any lesser offense."

(R. 692-693 [Emphasis supplied].) (Also see R. 693-694 and 698-699.)

Simply put, there is no way any assumption can cure the prejudicial misdirections (R.C. of Ohio, §2845.83[D]) to which reference is here being made. This follows because our jury was expressly told not to even consider any lesser offenses if they found the petitioner guilty of aggravated murder (R. 692-693).

Stated another way, to resolve this issue on the basis of the type of assumption referred to above would only be valid if the jury necessarily understood they should reject this clearly erroneous instruction. Thus, there is no way the Court below could validly conclude the jury actually resolved the inconsistency between these given instructions by actually rejecting the erroneous one.

Our conclusion in this regard becomes even more compelling when one realizes it is extremely doubtful, even assuming the jury fully understood the Court's charge (dealing with the relationship of manslaughter to murder and to aggravated murder), they perceived Earline Martin could have been found guilty of voluntary manslaughter even if the State first proved she intentionally caused the death of the decedent (with or without prior calculation and design) if the same was done under circumstances that made for the lesser charge.

At least this much seems to be beyond dispute, it is not possible to conclude this jury (after being told that if they found the State had proved the crime of aggravated murder their verdict should be guilty at that point and that they should only look to see if some lesser crime was committed if they first actually acquitted the accused of the greater charge) fully considered and rejected the included offenses of murder and manslaughter. On the other hand, even if a Court could possibly reason the jury ignored those instructions that were truly inconsistent, or at least rhetorically so, with the instructions required here, it simply does not seem possible that the charge as a whole could have left the jury with the correct understanding of the requirements of the law in this situation. See Sandstrom v. Montana, 442 U.S. at 518-519 n.7 and 525-526 and McFarland v. United States, 174 F.2d 538, 539 (D.C. Cir. 1949)

("... [i]f two instructions are in direct conflict and one is clearly prejudicial" a reversal is required.)

Despite the unassailable logic in the above analysis, the bottom line here is the Supreme Court of Ohio in addressing these specific issues did so on the basis of the following specific, totally indefensible, reasoning pattern:

> "When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Appendix "A", infra, at A 4 - A 5, State v. Martin, 21 Ohio St. 3d, at 94-95. (Emphasis supplied.)

It is apparent from the above quote that the Judges on the Ohio Supreme Court, by a process of mystical reasoning, have concluded that it can be assumed the jury acted other than as they had been instructed, and actually rejected the included offenses before reaching the verdict in this case. However, the grim fact is suppositious conclusions and hypothetical guesswork of the type referred to above, as being dispositive of the serious issue here under consideration, is flawed almost beyond belief. For in addition to being an inherently incredible position for any Court to take, it ignores the fact that to have done what the Court is willing to assume happened is contrary to what the jury was specifically instructed to do.

All this being so, it will simply not do to say the jury must have considered the lesser charges because the Ohio Supreme Court is prepared to assume they did in their rush to affirm this conviction.

ARGUMENT NO. IV

A State Cannot Constitutionally Require An Accused Who Defends Against A Murder Charge On The Grounds Of Self-Defense To Prove Themselves Not Guilty.

We start our analysis here with an idea that is yet to be rejected by this Supreme Court -- that is, that a State may not, consistent with the due process clause, impose on a defendant in a criminal trial the burden of persuasion with respect to the plea of self-defense.

The federal constitutional limitations on the allocation of a particular burden of persuasion with reference to what a State may characterize as "affirmative defenses" derive from the rule articulated in In Re Winship, 397 U.S. 358, 364 (1970). There it was held that a criminal defendant may not be constitutionally convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. Under this principle, an "affirmative defense" (such as self-defense) that brings into question, or seeks to negate, an element of the crime charged must, once sufficiently raised by the accused, be disproven beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197, 202-205 (1977). The ultimate logic here, of course, was based on the idea that the State "may not place the burden of persuasion on [an] issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d 605, 625 (5th Cir. 1980).

Counsel's serious disagreement with the ad hoc reasoning patterns relied on for the argument that the lack of self-defense is not an element of the charged offense should be viewed as total. Indeed, our position is that Patterson v. New York is

only properly regarded as dealing with defenses of mitigation, such as heat of passion and duress, which go only to the distinction between Murder and Manslaughter. Despite this indisputable fact, the majority opinions below simply refuse to reckon with the critical distinction between defenses in mitigation and those of justification -- such as a claim of self-defense.

Significantly, this Court in the Ohio case of Engle v. Isaac, 456 U.S. 107 (1982) rather pointedly credited our argument (-- that is, that the prosecution must disprove self-defense to establish mens rea, voluntariness, and unlawfulness) as raising "a colorable constitutional claim." Id., at 122 and n. 23. Also see Wynn v. Mahoney, 600 F.2d 448, 451 (4th Cir. 1979), where it was specifically noted that "The Supreme Court has not yet considered the proper allocation of the burden of proof with regard to self-defense." Indeed, in Hankerson v. North Carolina, 432 U.S. 233, 245 (1977), and Engle v. Issac, supra, the Court expressly articulated the idea that its disinclination to consider whether due process required proof of the lack of self-defense was because that issue was not properly before the Court. This being so, it is at once clear the issue as to the ultimate reach of Patterson can hardly be regarded as settled.

This analysis takes us then to the opinion made by our Supreme Court in State v. Martin, passim, which will surely be regarded by the Courts in Ohio as support for the flawed thesis that the State can with impunity constitutionally require an accused to prove they acted in self-defense. See, e.g., State v. Davis, 8 Ohio App. 3d 205 (1982). Cf., State v. Gideon, 52 Ohio App. 2d 70, 74 (1977). The fact that the supposed basis for this untenable position is said to be Patterson v. New York, is, of

course, rather startling. This is so because it can hardly be that Patterson is properly regarded as authorizing Ohio to punish as a murderer one who commits an entirely lawful act -- that is, kill another in self-defense. In any event, it is most difficult to understand how principles established in connection with the defense of duress can be deemed controlling in a self-defense analysis as was held to be the case in State v. Davis, supra, at 205.

A study of the Court's analysis (including the various cases relied on to defend its thesis) quickly shows it distills into an unconstitutional thesis. Simply stated, the clear cut indications are that the Court has somehow convinced itself that what is to be regarded as elements of any crime can be freely assigned by it or by the legislature. And, the Court must likewise be convinced that Patterson, although based on a gratuitous mitigation defense, controls even where the defense raised is an absolute one as distinguished from merely a partial defense.

Self-defense is not, of course, a confession and avoidance-type defense as was the case in Patterson. It is this fact that the Ohio Courts are apparently unwilling to fully credit. On the other hand, if our Courts are right, the State simply by the way it defines a particular crime can make an element out of the lack of intent, or the lack of an act, or even misidentification. Indeed, it can even make it a crime to kill in self-defense, something it has already come very close to doing, by making it an offense to purposely cause a death -- which is what happens in most self-defense homicide cases.

Granted, the elements of a particular offense should be prescribed by the statute itself. This is rightly the role of the legislature even though there is no doubt in anyone's mind

that our legislature's penchant is for making guilty verdicts as easy as is imaginable for juries to reach. Thus, the only protection left against outright tyranny when the same is indulged in by a prosecution-oriented legislature, or court, is the right of counsel to fearlessly challenge and appeal what he regards as a bad precedent.

For what its worth, it is fundamental due process that renders it impossible for either the Ohio legislature or its Courts to make it a crime to kill in self-defense. While this is certainly true, a majority of the members of both the Ohio Supreme Court and the Court of Appeals seem totally oblivious to the fact that this Court in Patterson, upon which they claim to rely, issued the warning that it did "not intend Mullaney" to be "[c]arried to its logical extreme ...." Patterson v. New York, 432 U.S. 197, 214-215, n. 15. Yet, history continues to show the Courts below are seemingly quite willing to take the Patterson rationale beyond its "logical extreme".

Our point here, simply put, is that if Ohio can require a defendant to prove self-defense simply by the way it defines the crime involved, and if self-defense can be properly analogized to the gratuitous defense involved in Patterson (which defense arguably could be totally eliminated by the simple device of abolishing the statute that created it), then it follows Ohio could eliminate the defense itself and make it a crime to kill in self-defense. If this is so, then surely this Court should make that point clear.

Prior to the Ohio Supreme Court's decision to review this case, counsel had routinely made the argument that it was most fortunate they had not ruled directly on the issue as to whether an accused can be required to prove himself not guilty when self-defense is raised. It was originally our hope that the Ohio

Supreme Court would surely credit the following insuperable analysis. First, the mere fact that one fires a gun and thereby kills another does not, alone, establish his guilt of any criminal offense. Next, "murder" and "manslaughter" are specific intent crimes. The intent involved in those crimes must be proven beyond a reasonable doubt by the prosecution. More simply put, the intent required to be proven must surely be a criminal intent. See United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977). ("... The defense of self-defense is directed toward negating the element of criminal intent," id., at 883.)

Viewed in this light, it makes no sense to argue that one can rightly be required to prove that he lacked criminal intent or suffer a guilty verdict. Since the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is necessarily diluted unless the prosecution is required to prove the existence of such intent. Undeniably then, the criminal intent aspect of any felonious homicide is irreconcilable with self-defense. This being so, it follows that requiring one to disprove criminal intent offends fundamental criteria. Isaac v. Engle, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion).

Based on the above analysis, what must be credited here is the fact that Earline Martin never contended she did not intend to shoot the decedent. Rather, it was maintained she shot without any criminal intent. See, Morissette v. United States, 342 U.S. 246 (1952), where this Court reasoned that the admittedly intentional act of taking certain government property could not be supposed by the Court to have been the only intent involved. Further, it was reasoned that the intent the accused admittedly had was only criminal if it was so determined after a

consideration of all the testimony (including the defense evidence that the taking had not been with any criminal intent) and all of the acts and circumstances surrounding the taking. Id., at 276. Also see, United States v. Gypsum Co., 438 U.S. 422, 429-430 (1978), and Holloway v. McElroy, 632 F.2d 605, 618 (5th Cir. 1980).

Even this is not all. Our Courts' reliance on Patterson, as authorizing the evisceration of the concept of self-defense, cannot survive for other equally cogent reasons. Here it should be noted the murder statutes under which Patterson was tried expressly provided:

> "[I]t is an affirmative defense (to murder) that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."

People v. Patterson, 39 N.Y. 2d 288, 347 N.E. 2d 898, 900 n. 1 (1976). We also know from the State Court's opinion in the Patterson case that:

> "...[t]he [trial] court instructed the jury that '[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree.'
>
> The court went on to explain that '[t]his does not mean that the emotional disturbance exonerates the killer, or renders his killing guiltless. As long as he actually intended to cause the death of another person *** the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder."

Id., at 347 N.E. 2d, at 901.

It is clear then that only by resort to arbitrary reasoning patterns, such as those articulated in the Courts below, does one

fail to recognize there is no valid way to analogize the murder-manslaughter relationship created by the New York statutes with Ohio's murder and manslaughter statutes. In New York (and this was the point critically addressed in Patterson and made most clear by the above quotes from the jury charge given in the trial of Patterson) an accused by proving he acted under an extreme emotional disturbance only reduces his crime from murder to manslaughter, id., 432 U.S. at 205-206. For our part, it is this cogent point that most of the judges in Ohio simply refuse to reckon with.

Indeed, in our judgment, the point made by Judge Jackson, the dissenter below, could not be better stated than was done by him in State v. Wealthy Johnson (Court of Appeals, Cuy. Cty. No. 42846, unreported). There it was stated:

> "We live in a time of increasing violence and crime. Justice Rehnquist recently observed that the law enforcement authorities 'cannot protect the lives of employees of this very court [the United States Supreme Court] who live four blocks from the building in which we sit ....' Coleman v. Balkcom, [451] U.S. [949], 49 L.W. 3804, 3805 (dissent from denial of certiorari). Yet under the position taken by the majority any of these employees, even the Justices themselves, if attacked by a criminal who they killed in self-defense, would be required to prove their innocence. We are also informed that the police of this country are themselves endangered and forced to kill hundreds of individuals a year in self-defense. See Sherman, 'Execution Without Trial: Police Homicide and the Constitution', 33 Vanderbilt Law Rev. 71 (1980). Under the majority's concept of the issue each of the police are subject to indictment for murder and released only if they can prove their innocence. We know that individuals are assaulted daily in our city and that the use of self-defense may in many instances be the only way to preserve the life of the law abiding citizen. Yet, the clear import of the majority decision as I read it, holds that such a citizen, acting in

> self-defense, must carry the burden of proving that he acted in self-defense, or be found guilty. In my humble opinion, this is contrary not only to the Ohio and United States Constitutions, but also to logic and common sense.
>
> "I am reconciled to the possibility in the present judicial climate that the position of majority in the case at bar may prevail: that citizens will lose their inalienable right of self-defense, or that, when acting upon the lawful exercise of that right, they will be required to prove their innocence. Nevertheless, if that position does prevail, it will do so without my support and over my most vigorous dissent."

Id., Dissenting Opinion.

The point made above by our Judge Jackson really crystallizes the inaptness of the reasoning resorted to by our Appellate Courts. Obviously if the reasoning relied on by those Courts is sound, then this Court really ought to say so in no uncertain terms.

CONCLUSION

It is certainly one thing to tell a jury that if the accused committed certain acts her crime would be murder but that they had the power to reduce the charge to manslaughter if the accused proved certain facts to mitigate the seriousness of her crime. And, it is another thing to tell the jury the accused has to prove her acts were not criminal and that she was justified in acting as she did to avoid suffering a murder conviction.

Under the instructions given in this case, despite the requirements of due process In Re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), Earline Martin was required to disprove the criminal intent element of the aggravated murder charge. And, she was required to contend with inconsistent and conflicting instructions. When these flaws are augmented by other errors and the prosecutor's egregious arguments to the jury, the conclusion that Earline Martin should be given another trial is really not even debatable since it cannot be avoided.

For all the above reasons, this Court should grant certiorari to the end that this cause can be reviewed and reversed.

Respectfully submitted,

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85-6461

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 25th day of February, 1986.

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APR 18 PAGE 18
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NO. 85-6461

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

I. Whether a criminal conviction should be overturned on the basis of the prosecutor's comments taken out of context and not objected to by defense counsel.

II. Whether petitioner was prejudiced by the trial court's instructions that do not require or suggest unanimity among the jurors on the greater offense, before they may evaluate the lesser offense.

III. Whether Ohio Revised Code §2901.05 which requires the prosecution to prove beyond a reasonable doubt, every element of a homicide offense as defined by statute, and does not require the defendant to disprove an essential element of this offense and which requires defendants to prove, by a preponderance of the evidence, the affirmative defense of self-defense violates due process of law.

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TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the conviction. The Supreme Court of Ohio, likewise affirmed the conviction.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal questions is therefore presented by the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner, Earline Martin, was indicted, tried and convicted of the crime of aggravated murder, Ohio Revised Code §2903.02, with firearm specification. Petitioner's appeals to the Court of Appeals, Eighth Judicial District, and the Ohio Supreme Court, resulted in her conviction being affirmed.

STATEMENT OF THE FACTS

The State's evidence consisted of fifteen witnesses which proved beyond a reasonable doubt that the petitioner, Earline Martin, was guilty of aggravated murder. The victim was Walter Martin, a seventy-three year old retired police officer and the petitioner's sixth and last husband. It was Mr. Martin's second marriage. During the duration of their marriage, in May of 1983, Mr. Martin was hospitalized for a heart attack and stroke (R. 437).

The testimony of several State witnesses established that this short-lived marriage was not harmonious. Delores Williams, Walter Martin's eldest daughter, testified that on July 18, 1983, she called petitioner to inform her Mr. Martin had temporarily moved into her Warresville Heights apartment (R. 232). Earline Martin's reaction to the separation was as follows: "Your father is not going to leave me again. I took my marriage vows seriously. I said, 'To death do us part' and that's what I meant" (R. 232).

Narleen Brown, the granddaughter of Walter Martin, testified to a conversation with Earline Martin on the same day. Regarding Mr. Martin leaving her, petitioner specifically stated: "I'm going to tell you one thing, Nickie, bad luck will follow your daddy (grandfather) for the rest of his life," and hung up the phone (R. 289).

Gloria Oliver, the second daughter of Walter Martin, testified to a conversation with petitioner after the couple's first separation. Petitioner confided in her, admitting that "Before I let your father make a fool of me again, I'll blow him away, Gloria Jean" (R. 315). Gloria Oliver also called the petitioner's home on the morning of July 21, 1983, shortly after the victim's murder. In answer to her question as to what was wrong, the petitioner told: "Gloria Jean, I'm tired of fighting with your father" (R. 318).

The State further offered the testimony of Mr. Anthony LaPerna, Walter Martin's attorney. Mr. LaPerna substantiated that Walter Martin had twice

sought to petition for divorce during his brief marriage to petitioner. This dated back to December, 1982, and again on July 19, 1983 (R. 342, 344).

The State submits that it was as a direct result of this unhappy marriage and the fact that the victim wanted a divorce, further established by the threats of petitioner, that ultimately lead to the murder of decendent by petitioner.

The events of July 21, 1983:

According to the written statement of petitioner, in the early morning hours of July 21, 1983, she went upstairs, got a gun, and went into the kitchen where Walter Martin was sitting. Walter Martin was coming towards her, and she shot him, causing his death (R. 361-362). The petitioner claimed she shot him in self-defense. The jury, after being presented with the physical evidence of this case, rejected this claim of self-defense and found petitioner guilty of aggravated murder.

Sadie Martin, the roommate of Delores Williams, testified that prior to the killing, at approximately 9:00 in the morning, Walter Martin called his daughter. She spoke to Mr. Martin several minutes before informing Delores her father was on the line. Sadie Martin came back to the phone to tell him Delores would return his call. She heard petitioner over the phone yell, "Dirty--" and five or six subsequent gunshots in rapid succession. The phone dropped at the other end of the line (R. 1720.

The Emergency Medical Services were the first to arrive at the murder scene (R. 87). The petitioner testified that she first called her attorney, Thomas Watson, who advised her to call the police (R. 445). Mr. Roman Black of the Cleveland Emergency Medical Service testified to receiving the broadcast at 9:44 a.m., and arriving at the scene ten minutes later (R. 86). A woman let him in, whereupon he found a prone male lying on the kitchen floor (R. 87-88). The woman, dressed in a robe with curlers in her hair, appeared calm (R. 96). As to the condition of the body, there was a large amount of coagulated blood nearby (R. 90), and the victim was dead (R. 89, 109).

The police arrived at the scene at approximately 9:50 a.m. (R. 112). Terry Hageman, a patrolman for the city of Cleveland, testified that he and his partner were told by petitioner that she had shot her husband (R. 114). She told there where to find the gun used to kill the victim (R. 122, 123).

Upon checking the gun, it appeared to have spent bullets (R. 124). They observed the body lying on the floor, next to a phone jack on the floor board (R. 114-116). There was a telephone on the wall above the jack (R. 117).

Detective Pollutro of the Cleveland Police Department Scientific Investigation Unit, testified to receiving the firearm from Detective Taliaferro, assigned to the case (R. 145). The weapon was tested for trigger pull (R. 147). Detective Pollutro was asked to determine whether the morgue pellets, removed from the dead man, were fired from this particular gun. The comparison test established that this gun could have fired the bullets causing the victim's death (R. 150-151).

The State presented two witnesses from the Cuyahoga County Coroner's Office. Dr. Robert Challener, an expert in forensic, anatomical and clinical pathology, gave the following testimony (R. 37). His observations showed the victim received three gunshot wounds. He concluded the gunshot wound entering the trunk area would have been fatal even if it was the only shot fired (R. 47-48). He also opinioned that the wound to the chest had been fired from a distance of two feet or beyond (R. 39-42). No drugs or alcohol were found in the victim's body (R. 51-52).

Sharon Rosenberg, a trace evidence technician for the Cuyahoga County Coroner's Office, testified to the results of Trace Metal Detection and gunshot residue tests performed on the decedent's body and clothing (R. 67-70). She testified there was no evidence of metal on the victim's hands to indicate that he recently had contact with a metal object such as a gun (R. 72). The probable distance from which the murder weapon was fired was beyond two to three feet (R. 74-75). Her testimony corroborated that of Dr. Challener's testimony.

The petitioner was the sole witness for the defense. According to her testimony, in the early hours of July 21, 1983, she and the victim fought over grocery money (R. 441). She claims that the victim hit her (R. 441). Later, she went upstairs, washed and rolled her hair, and put on a duster (R. 441-442). Petitioner then went into the bedroom and got a gun (R. 442). She intended to hide it in the kitchen where the victim was sitting (R. 442-443). Before she could do so, the victim questioned her as to what she had in her hands (R. 443). She then shot him (R. 443), six times.

Defense counsel sought to establish a defense of self-defense. Defense counsel elicited from petitioner, a prior incident concerning an alleged pistol-whipping petitioner allegedly received from the victim some three months before the killing (R. 432).

The defense counsel requested jury instructions on self-defense and the trial court complied (R. 699-704).

REASONS FOR DENYING THE WRIT

I. A criminal conviction should not be reversed on the basis of the prosecutor's comments, taken out of context, and not objected to by defense counsel and were not prejudicial.

Petitioner contends that the prosecutor's remarks in closing argument characterizing petitioner's testimony as fabrication, were substantial prejudicial error requiring reversal.

We begin our discussion by observing that defense counsel, like the prosecutor, must refrain from interjecting personal beliefs into the presentation of their case and must not be permitted to make unfounded and inflammatory attacks on opposing advocates. See, Berger v. U.S., 295 U.S. 78 (1935). The Berger court, made is crystal clear that the adversary system permits the prosecutor to prosecute with "earnestness and vigor." Ibid.

In the present case, the prosecutor's remarks in closing argument, emphasizing that the testimony adduced at trial implies that the petitioner was lying, was a characterization of the evidence that did not induce the jury to base their decision on considerations not suggested by the evidence. It is well established that comments on the credibility of a witness in closing argument are permissible. See, State v. Price, 60 Ohio St. 2d 136 (1979). It should also be pointed out that the record reflects that defense counsel did not properly object to the above mentioned prosecutorial remarks. Where no timely objection is made by counsel, the objections are deemed waived. See, State v. Williams, 51 Ohio St. 2d 112 (1977); also, Wainwright v. Sykes, 433 U.S. 72 (1977).

Finally, this Court in U.S. v. Young, 105 S. Ct. 1038, ___U.S.___ (1985) observed that a prosecutor's comments, standing alone, would never justify a reversal of a criminal conviction. This Court held that a reviewing court

must also take into account, defense counsel's opening salvo.

II. The petitioner was not prejudiced by the trial court's instructions that do not require or suggest unanimity among the jurors on the greater offense, before they may evaluate the lesser offense.

Petitioner next contends that she was denied due process of law when the trial judge instructed the jury not to consider the lesser-included offenses until it made a determination regarding the offense of aggravated murder. Although petitioner argues that these instructions had the effect of preventing the jury from considering the lesser-included offenses, we are not persuaded that this was the case.

This argument was previously rejected in State v. Muscatello, (1977) 57 Ohio App. 2d 231 [11 O.O. 3d 320], affirmed (1978), 55 Ohio St. 2d 201 [9 O.O. 3d 148], where the Ohio Supreme Court stated that a similar charge on voluntary manslaughter and its lesser-included offenses was not prejudicially erroneous. When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case sub judice, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

III. The Ohio law requiring defendants to prove, by a preponderance of the evidence, the affirmative defense of self-defense, does not violate due process of law where the prosecution must prove, beyond a reasonable doubt, every element of a homicide offense, and does not require the defendant to disprove any essential element of this offense.

Our first consideration concerning petitioner's contention that the state of Ohio may not constitutionally place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged. Petitioner asserts that self-defense negates the mens rea of aggravated murder and that requiring a defendant to prove self-defense thus compels the defendant to prove his innocence by disproving criminal intent. Since it is constitutionally impermissible to require an accused to prove his innocence, petitioner contends that once a defendant produces evidence of self-defense, the prosecution must then disprove self-defense

beyond a reasonble doubt.

There is no merit in this contention. Ohio Revised Code §2901.05(A) clearly states that the burden of proving all elements of the offense charged including mens rea, beyond a reasonable doubt, is on the prosecution. This section also places the burden of proving an affirmative defense, by a preponderance of the evidence, on the accused. Ohio Revised Code §2901.05(C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." This court has long determined that self-defense is an affirmative defense. See State v. Nolton, (1969) 19 Ohio St. 2d 133 [48 O.O. 2d 119].

In the case sub judice, petitioner was charged with the offense of aggravated murder. Thus, the state was required to prove beyond a reasonable doubt the elements of that crime, defined by Ohio Revised Code §2903.01 as purposely, and with prior calculation and design, causing the death of another. Certainly no less can be required of the state because "* * * the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, (1970) 397 U.S. 358, 364 [51 O.O. 2d 323]. Petitioner contends however, that the Constitution requires more. Not only must the state prove the elements of the crime charged, appellant asserts, it must also disprove self-defense. We are unable to find support for this contention.

In Patterson v. New York, (1977) 432 U.S. 197, the United State Supreme Court addressed a question very similar to that in the case sub judice. At issue was the constitutionality of a New York statute which placed upon the defendant the burden of proving the affirmative defense of extreme emotional distress. The Patterson court held that, consistent with due process, the prosecution was required to prove beyond a reasonable doubt only those elements included in the statutory definition of the offense charged. The recognition of an affirmative defense, the court stated, did not require the state to prove its nonexistence:

"We thus decline to adopt as a constitutional imperative, * * * that a State must disprove beyond a reasonable doubt every fact constituting any

and all affirmative defenses related to the culpability of an accused." Patterson, supra, at 210.

The Supreme Court also recognized in Patterson that the obligation to disprove the existence of self-defense is a burden which the state, in its judgment, may properly deem too onerous to undertake in view of the fact that an affirmative defense is one involving facts peculiarly within the knowledge of the defendant, which he, not the state, may fairly be required to prove. This is exactly the view contained in Ohio Revised Code §2901.05(C)(2).

The Patterson court also noted that there are affirmative defenses which do not seek to negate any of the elements of the offense which the state is required to prove. Id. at 206-207. This is the nature of self-defense under Ohio law. This court, in State v. Poole, (1973), 33 Ohio St. 2d 18, 19 [62 O.O. 2d 340], characterized the defense of self-defense as a "justification for admitted conduct." Self-defense represents more than a "denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *." Id. Rather, we stated in Poole, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. Id. Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve that defendant from culpability rather than to negate an element of the offense charged. In the case sub judice, the State proved beyond a reasonable doubt that petitioner purposely and with prior calculation and design, caused the death of her husband. Petitioner did not dispute the existence of these elements, but rather sought to justify her actions on grounds she acted in self-defense.

We therefore hold that Ohio Revised Code §2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove any essential element of this offense. Thus, the state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense. Accord, State v. Moran, (Cuy. Cty. Ct. App.,

October 27, 1983), unreported case number 45879, certiorari denied Moran v. Ohio, (1984), ____ U.S. ____, 83 L. Ed. 2d 285.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: _____
GEORGE J. SADD
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SERVICE

A copy of the foregoing Brief in Opposition to Petition for a Writ of certiorari has been mailed this 31st day of March, 1986, to: James R. Willis, Attorney for Petitioner, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114.

_____
Assistant Prosecuting Attorney

NO. 85-6461

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner

vs.

STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT

AFFIDAVIT OF FILING

I, JOHN T. CORRIGAN, being first duly cautioned and sworn, depose and say that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the thirty-first day of March, 1986, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C. 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned manner. Such mailing was made within the time permitted by this Court for such a filing.

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7730

SWORN to before me and subscribed in my presence this 31st day of March, 1986.

SHEILA K. BURT, Notary Public
For The State of Ohio - Cuyahoga County
My Commission Expires Jan. 15, 1990

NOTARY PUBLIC

8

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

OHIO REVISED CODE § 2903.01

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another who is a member of a group engaging in a pattern of [illegible] to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall [illegible] aggravated murder case be instructed on a manner that it may believe that a person may commit or attempt to commit any offense unless it finds that the person is to be convicted, knowingly engaged in a common [illegible] with others to commit the offense in question or because the offense and the manner or circumstances would be likely to produce death. Culpable intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. It is not [illegible] an aggravated murder case to be instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be convicted, because he or she engaged in a common design with others to commit the offense in question or because the offense and the manner or circumstances would be likely to produce death, unless intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense, the jury shall be instructed that the inference is not conclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 45879

STATE OF OHIO

Plaintiff-Appellee

vs.

BETTY MORAN

Defendant-Appellant

JOURNAL ENTRY
and
OPINION

DATE OF ANNOUNCEMENT OF DECISION: OCT 27 1983

CHARACTER OF PROCEEDING: Criminal appeal from Common Pleas Court Case No. Cr. 164,766

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

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McMANAMON, ANN, J.:

Betty Moran, the defendant below, appeals her conviction on a charge of the aggravated murder (R.C. 2903.01), of her husband, Willie Moran.

It is undisputed that, on the afternoon of May 15, 1981, Betty Moran shot Willie Moran six or seven times after a lengthy and intermittent argument over some money the decedent believed his wife was witholding from him. (Tr. 225, 226, 227) Three days later the appellant learned that police were looking for her in connection with the slaying and she called them, directed them to the victim's body and confessed to the killing.

An indictment, trial in Common Pleas Court and conviction followed, from which Betty Moran appeals, enumerating three assignments of error:

I.

"THE COURT ERRED IN DENYING THE DEFENDANT'S VARIOUS MOTIONS FOR JUDGMENT OF ACQUITTAL AND HIS [sic] MOTION FOR A NEW TRIAL."

II.

"THE COURT ERRED IN CHARGING THE JURY, THAT TO PREVAIL ON A PLEA OF SELF-DEFENSE THE DEFENDANT WAS REQUIRED TO, IN EFFECT, PROVE HIMSLEF [sic] NOT GUILTY."

III.

"A DEFENDANT IS DENIED DUE PROCESS AS A CONSEQUENCE OF A JURY INSTRUCTION THAT AS A PREREQUISITE TO EVEN RAISING THE DEFENSE OF SELF-DEFENSE, SHE HAD TO ESTABLISH THAT THE DECEDENT WAS THE AGGRESSOR WHICH INSTRUCTION EFFECTIVELY DILUTED THE PROSECUTION'S BURDEN OF PROVING ALL THE ELEMENTS OF THE OFFENSES CHARGED."

I

In appellant's first assignment of error she argues that the trial court erred when it overruled her motions for acquittal and new trial because there was insufficient evidence produced by the state to demonstrate that appellant acted with prior calculation and design or that the killing of Willie Moran was unlawful.

This assignment of error is not well taken.

The standard to be applied by the trial court in ruling on a defendant's motion for acquittal can be found in State v. Bridgeman (1978), 55 Ohio St. 2d 261. The syllabus to that opinion states:

> "Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

After careful review of the record it is apparent to this court that appellant's motions were properly overruled as there was sufficient evidence presented on each element of the offense of aggravated murder to require submission of the matter to the jury and, later, to support the appellant's conviction.

The elements of aggravated murder are found in R.C. 2903.01(A) which provides:

> "(A) No person shall purposely, and with prior calculation and design, cause the death of another."

The Ohio Supreme Court has previously construed "prior calculation and design" in State v. Robbins (1979), 56 Ohio St. 2d 74 and State v. Cotton (1978), 56 Ohio St 2d 8, by stating:

> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." Robbins, supra at 79, citing Cotton.

This court in State v. Jenkins (1976), 48 Ohio App. 2d 99, at 102 noted:

> "The trier of fact must look to the context in which the killing occurred to determine whether there was prior calculation and design. Some of the important factors to be examined and considered in deciding whether a homicide was committed with prior calculation and design include: whether the accused knew the victim prior to the crime, as opposed to a random meeting, and if the victim was known to him whether the relationship had been strained; whether thought and preparation were given by the accused to the weapon he used to kill and/or the site on which the homicide was to be committed as compared to no such thought or preparation, and whether the act was drawn out over a period of time as against an almost instantaneous eruption of events. These factors must be considered and weighed together and viewed under the totality of all circumstances of the homicide."

Betty Moran's statement to police three days after the shooting, which was read to the jury, was amplified on direct and cross-examination at trial. Appellant's pre-trial admissions and trial testimony demonstrated that she and the victim had an argument; that the victim allegedly threatened to kill her when he awakened if she did not have certain money he wanted; that she left his presence and attempted unsuccessfully to procure the money demanded; that she returned while the victim was sleeping, picked up the pistol she knew was available at his bedside that she fired a shot; that she ignored his demand for an ambulance and then emptied the six shot revolver into the

victim's body; that she re-loaded it and fired two or three more times at him.

A trier of fact could reasonably infer from the evidence presented that the lapse of time between the Morans' final argument and the fatal shots fired by Betty Moran provided sufficient opportunity for appellant to plan the killing and for that planning to constitute prior calculation and design. In addition, the fact that appellant fired at least seven shots at the decedent could cause a jury to conclude reasonably that appellant acted with something more than "instantaneous deliberation" when she shot her husband. See Cotton, supra.

It would appear that the jury chose, on the basis of the evidence presented, to reject appellant's argument of self-defense and to find her guilty of aggravated murder.

It is well settled that the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact and a reviewing court will not reverse a judgment of conviction, where the record shows that a verdict of guilty was returned by a jury on sufficient evidence. State v. DeHass (1967), 10 Ohio St. 2d 230.

In this assignment of error appellant also argues that prior calculation and design cannot be established when there is evidence showing that, in the midst of an ongoing episode of serious confrontation, one party resorts to the use of deadly force in self-defense. It is her contention that the use of force in these circumstances cannot be considered to be unlawful, and therefore the charge of aggravated murder and murder should not have been submitted to the jury. We disagree and cite this court's opinion in Jenkins, supra, which stands for the proposition that the mere interposition by defendant of the affirmative defense of self-defense does not preclude

a jury from rejecting this defense and reasonably concluding that there was (or was not) prior calculation and design on defendant's part.

II and III

Appellant's second and third assignments of error relate to the trial court's charge to the jury on self-defense. We will consolidate them for consideration.

It is appellant's contention, the provisions of R.C. 2901.05 notwithstanding, that the court's instructions to the jury which placed the burden of proving the defense of self-defense upon the appellant, violated her due process rights by requiring appellant to prove herself innocent of the charges against her. In support of this proposition appellant relies on Patterson v. New York (1977), 432 U.S. 197 and Mullaney v. Wilbur (1975), 421 U.S. 684. But, as noted in Krzeminski v. E.P. Perini (C.A.6, 1980), 614 F. 2d 121 (involving an Ohio prisoner's petition for habeas corpus relief alleging errors in the state trial judge's jury instructions):

> "Patterson makes it clear that so long as a jury is instructed that the state has the burden of proving every element of the crime beyond a reasonable doubt, there is no due process violation. The state may properly place the burden of proving affirmative defenses such as self-defense, extreme emotional disturbance or insanity upon the defendant. Patterson, supra; ... What the state may not do is presume that an element of a crime exists as a result of given conduct and then place the burden of showing otherwise on the defendant. Mullaney v. Wilbur, supra." Id. at 123-124.

Revised Code 2901.05, in pertinent part provides as follows:

> "(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is

> upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.
>
> * * *
>
> "(C) As used in this section, an 'affirmative defense' is either of the following: "(1) A defense expressly designated as affirmative; (2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

The Supreme Court of Ohio has determined that self-defense is an affirmative defense. See State v. Poole (1973), 33 Ohio St. 2d 18. It has also held that:

> "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. State v. Robbins (1979), 58 Ohio St. 2d 74."

In order for appellant to establish the affirmative defense of self-defense it was imperative that she produce evidence to show that she was not the aggressor (See Robbins, supra). The evidence introduced by the state clearly indicated that appellant left her husband's presence, after words were exchanged, and that, after a lapse of time, she returned to the room where her husband was lying abed and shot him in the back and chest. To maintain a defense of self-defense the court's instruction fairly required the appellant to show that she was not the aggressor, thus providing a justification for her admitted actions which was, if existent, peculiarly within her own knowledge as envisioned by R.C. 2901.05 (C)(2), and which, it was

her claim, motivated the killing.

The issues raised by appellant in her last two assignments of error have been considered by this court several times in the past. We have held, and continue to do so here, that the trial court's instruction which placed the burden of proving the affirmative defense of self-defense upon the appellant did not violate her right to due process. See State v. Jones (March 31, 1983), Cuyahoga App. No. 44983, unreported; State v. Henderson (Dec. 17, 1981), Cuyahoga App. No. 43489, unreported; State v. Walker (May 30, 1980), Cuyahoga App. No. 40586, unreported.

After reviewing the instructions given in the case at bar, we are satisfied that a proper rendition of Ohio law was given on the charge of self-defense and on the charge that the state was required to prove beyond a reasonable doubt each and every essential element of the crime charged.

Assignments of error II and III are not well taken.

Judgment of the Court of Common Pleas is affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the COMMON PLEAS Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PATTON, C. J.,

DAY, J., CONCUR.

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JUDGE

ANN McMANAMON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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NO. 85-6461

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

EARLINE MARTIN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

It is certainly true that counsel in any cause has an absolute right to express his opinion, provided, of course, it is expressed in a professional manner. On the other hand, counsel has no right to misstate the facts. Yet, that is what precisely has been done by counsel opposite in the State's Brief filed in this cause. For here, apart from the statement made therein that the prosecutor only "implie[d]" in her argument that Petitioner had lied in her evidence (Onp. Brief, p.5), the statement that this Court "recognized in Patterson that the obligation to disprove the existence of self-defense is a burden which the State, ... may properly deem too onerous to undertake ...." (id., p. 8) is one that finds no support at all in Patterson. Another statement, which does not square with the evidence, is that "petitioner did not dispute the existence of ... [the elements of aggravated murder], but rather sought [only] to justify her actions on grounds she acted in self-defense" (ibid). See Ramirez v. Jones, 683 F.2d 712, 716 (2d Cir. 1982) and Mason v. Balkon, 669 F.2d 222, 227 (1983).

Obviously the categorical statement that petitioner conceded she acted "purposely with prior calculation and design" is one that cannot be defended no matter how one looks at it. Indeed, at the risk of possibly gilding the lilly, the State's argument (in which the statement isolated above was used as a major premise) shows the extent to which reliance on artificial premises can push one's reasoning patterns to a level of farfetchedness that reaches Disneyland proportions. For if petitioner actually conceded that her actions amounted to aggravated murder if they were not done in self-defense, then why is petitioner arguing that the lesser offenses of aggravated murder were not properly submitted to the jury?

I

The point emphasized here is that the Ohio Supreme Court, in its resolution of the first issue argued by the State, reached and resolved the merits of our contentions. In it's view the wrongs wilfully visited on petitioner, by arguments the prosecutor had to know were bad, were harmless. This the Ohio Supreme Court oraculated or devined to be so because as they saw it "even absent the prosecutor's statements the jury would have found appellant guilty ... [of aggravated murder]" (State v. Martin, 21 Ohio St. 3, at 95-96). (Also see Appendix to Petition, at pp. A 5-6.) Further, the Record here shows the Ohio Court of Appeals in its review likewise specifically addressed this issue. (Id., at pp. A 9-10.)

II

The State's argument No. II, perhaps even moreso than the various opinions rendered below, gives credibility to our assailment of Ohio's Muscatello Opinions (cited by both the Petitioner and Respondent), which are as wrong as two left shoes. For here, because of these flawed opinions, we have counsel for the State making the argument that (although the jury was improperly told not to even consider any lesser included offense, or offenses) because the jurors reached a verdict on the higher offense it can be assumed with impunity they totally disregarded the improper instructions. Further, we are being told that in these situations

it can likewise be assumed the jurors actually "considered and [specifically] rejected evidence regarding self-defense and the lesser included offenses" (Opp. Brief, p. 6).

The absolute illogic of the State's convoluted positions in this regard proves the extent to which our prosecutor seems quite willing to push even a ridiculous thesis beyond the bounds of commonsense if its adoption would preserve a flawed conviction intact. And, if repudiated would disturb a procedure that has resulted in countless indefensible convictions. In our judgment, there is no way the doctrines here being urged by the State can be squared with the requirements of due process -- its just that simple.

In taking note of the State's argument, the fact of its failure to make any reference to Sandstrom v. Montana, 442 U.S. 510 (1979) and the other cases relied on by petitioner should be credited as being more than the mere indication of a failure to offer a reasoned analysis in support of a position. It should be viewed as an inability to do so.

III

The State's arguments under this segment of its Brief actually distills into a blind, and almost pathetic, adoption of some of the arbitrary positions taken in the majority opinions rendered in the Courts below. Indeed, the State's failure to specifically address any of the arguments made by the petitioner, or even those made by the dissenters on Courts below, was obviously deliberate and for good reason. The ploy is that nothing should be said by the State that might in anyway provide even a slight indication that maybe this Court should review this case.

Indeed, it can only be for this, or some comparably indefensible reason, that the State did what it could to resist the efforts of the "Ohio Public Defender Commission" to participate as Amicus Curiae in this cause. In our judgment, the State's unwillingness to even endorse the participation of the Ohio Public Defender Commission exposes their interest to be that it should win this case rather than to see that justice is done.

And that is really sad, because it cannot be denied that "the duty of a prosecutor is to seek justice," Model Code of Professional Responsibility, E.C. 7-13 (1980).

Still the points made by the Petitioner and by the Public Defender Commission in their Briefs show the very real need why this Court should review this petitioner's cause. Hopefully this Court will resolve the issues raised in this cause.

CONCLUSION

Our condemnation of the Ohio Supreme Court's Opinion, which has been parrotted by Respondent, should be viewed as total. Indeed, the State's argument that Patterson v. New York, 432 U.S. 197 (1977), stands for the proposition that a State can convict one as a murderer when it is just as likely they acted in self-defense is really startling. This is so because if the Court had intended to sanction a rationale so contrary to logic and fairness, as the State's reading of Patterson seems to be, then surely this Court would have said so. Obviously then, since the State of Ohio will continue to misunderstand and distort Patterson, and read its propositions as authorizing them to convict people even when the evidence is in equipoise on the issue of self-defense, the only hope for those who have been victimized, or who could be victimized, thereby lies with this Court.

Hopefully too, the Court will also understand our belief here is that the trial prosecutor's egregious summation was wilfully designed to corrupt the trial and rob it of legitimacy. See National Prosecution Standards, Standard 25.1 (Nat'l. Dist. Atty. Ass'n. 1977). This is so because: If the prosecutor truly had not believed the argument made would be, as it surely was, so very effective, then knowing the argument was improper she obviously would not have taken the calculated risk our reviewing Courts would ultimately declare it to have been harmless. Indeed, the prosecutor's reliance on our Court's past performances is really understandable. Cf., State v. Abboud, 13 Ohio App. 3d 62,

468 N.E. 2d 155, 157 (1983). For it shows that in our county the price our court-pampered prosecutor's have historically had to pay for making some of the most inflammatory arguments ever rendered in any American court room would not outweigh that of a peppercorn. Stated another way, there is nothing in any of Ohio's reported cases, at least insofar as this counsel's research is concerned, which shows anything beyond an occasional reversal that could even possibly provide any real incentives for our prosecutors to control their behavior in front of jurys. Compare United States v. Burse, 531 F.2d 1151 (2d Cir. 1976) and United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). Also see United States v. Singleterry, 646 F.2d 1014 (5th Cir. 1981).

Since this Court has effectively shielded offending prosecutors from personal liability for wrongful acts done when "presenting the State's case," Imbler v. Patchman, 424 U.S. 409, at 431 (1976), it seems only right that this Court should at least suggest some stricter approach than the harmless error routine. Hopefully it will be one that is meaningfully consistent with a problem that has really been compounded, which is being rotely used as a panacea by the Courts in Ohio and elsewhere.

For all the reasons argued above and in the Petition this Court hopefully will address the flawed summation made in this case as having been a product of the type of gamesmanship up with which no Court should ever put.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioner's Reply Brief was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 4th day of April, 1986.

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Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6461

In the Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN, PETITIONER

v.

STATE OF OHIO, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 4, 1986
CERTIORARI GRANTED APRIL 21, 1986

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	CUYAHOGA COUNTY COURT OF COMMON PLEAS
August, 1983	Indictment Filed
August 8, 1983	Defendant Arraigned, Enters Not Guilty Plea
December 16, 1984	Defendant Found Guilty By Jury, Sentenced To Life For Murder, Plus 3 Years Consecutive For Gun Specification
January 16, 1984	Notice Of Appeal Filed
	IN THE OHIO COURT OF APPEALS
January 17, 1984	Appeal Docketed
November 21, 1984	Announcement Of Court's Decision (Affirming Conviction) Filed
December 3, 1984	Journal Entry And Opinion, Affirming Conviction, Filed
	IN THE SUPREME COURT OF OHIO
January 28, 1985	Notice Of Appeal (to Ohio Supreme Court) Filed
February 25, 1985	Memorandum In Support Of Jurisdiction Filed
March 15, 1985	Memorandum Opposing Jurisdiction Filed By State
April 17, 1985	Motion For Leave To Appeal Allowed
April 17, 1985	Order To Certify Record Sent To Ohio Court Of Appeals And Cause Docketed On Its Merits
January 15, 1986	Opinion Affirming Conviction Filed

CUYAHOGA COUNTY COMMON PLEAS

THE TERM OF MAY OF 1983

Case No. CR 184334

THE STATE OF OHIO

vs.

EARLINE K. MARTIN

Date of Offense July 21, 1983

A TRUE BILL INDICTMENT FOR AGGRAVATED MURDER R.C. 2903.02 WITH GUN SPECIFICATION

THE STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Walter Martin.

SPECIFICATION ONE: (gun)

The Grand Jurors further find and specify that the offender Earline K. Martin had a firearm on or about her person or under her control while committing the offense charged in this count of the indictment.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ [Illegibile]
Prosecuting Attorney

Foreman of the Grand Jury

COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO

No. CR-184334

OHIO, PLAINTIFF

v.

EARLINE MARTIN, DEFENDANT

JURY CHARGE

[673]

THE COURT: Ladies and gentlemen of the jury. At this time you have heard the evidence and arguments of counsel. It now becomes my duty to instruct you on the law to apply to this case. The Court and jury have separate functions, you decide the disputed facts and the Court provides the instructions of law.

It is your sworn duty to accept these instructions and apply the law as it is given to you. That is, you are to apply it as your guide throughout your entire deliberations and apply it to the facts, as you find the facts to be, and then render your judgment accordingly. This you are required to do, independent and apart from any notion or opinion of any kind or nature which you may have ever possessed as to what the law is or what the law ought to be, given the facts in the particular case. Therefore, you are not permitted to change the law, nor to apply your own ideas of what you think the law ought to be.

It also follows that, in strict keeping with your oath, you refuse absolutely to be moved, swayed or influenced by considerations such as sympathy for or bias or prej-

udice against either [674] the State of Ohio or the Defendant, Earline Martin.

A criminal case begins with the filing of the indictment by the Grand Jury. This indictment informs the Defendant that he has been charged with a crime. It may not be considered for any other purpose. The plea of not guilty is a denial of the charge and puts in issue the essential elements of the crime or crimes charged in the indictment. At the very outset, the jury will understand that the mere fact the Defendant has been charged by the Grand Jury of this county raises no presumption of the guilt of the Defendant. The Grand Jury is a one-sided procedure. The indictment itself is simply the means created by law for presenting, in a formal way, a criminal charge and again, you will not consider the fact that it has been made as in any way or manner constituting evidence or guilt of the Defendant.

At the very commencement of this trial, counsel for the State and the defense addressed the jurors in what we formally refer to as "opening statements." In such opening statements both counsel sought to present an outline of what they believed the testimony of the evidence [675] would disclose as the trial progressed. When presentation of all the evidence was completed, counsel for the State and for the Defendant addressed the jury in what we have referred to as "closing arguments," and in those closing arguments they set forth and developed theories and conclusions which they believed may reasonably be drawn from all the evidence in this case.

Such opening statements and closing arguments are permitted in an effort to assist the jury, if possible, in understanding and reaching the conclusions as to the issue which the jury is called upon to decide. You are instructed that such opening statements and closing arguments do not constitute evidence in this case, and will not be considered as evidence by the jury.

The evidence, as I have said, does not include the Grand Jury indictment, the opening statements or closing

arguments of counsel, and further, does not include any answers to questions that I have instructed you to disregard.

You must not speculate as to why the Court sustained an objection to any question or what the answer to such question might have been. [676] You must not draw any inferences or speculate on the truth of any suggestions included in the question that was not answered.

As I previously indicated to you, a criminal case begins with the filing of the indictment by the Grand Jury. To the indictment, as returned by the Grand Jury, and as read to you, the Defendant has entered a plea of not guilty. By such plea, the Defendant denies the existence of each and every element and circumstance which, as a matter of law, goes to make up and constitutes a crime or offense charged in the indictment and any lesser included offense that you may consider.

The plea of not guilty as so tendered by the Defendant, has, as a matter of law, the effect of placing upon the shoulders of the State of Ohio the burden of proving beyond a reasonable doubt the existence of each and every material allegation and averment of the indictment.

The plea of not guilty entered by the Defendant, as a matter of law, has a further effect; such plea clothes the Defendant with the legal presumption of innocence. This presumption of innocence is not a mere matter of form, but [677] rather is a shield which the law throws about the Defendant.

This presumption of innocence is afforded the Defendant as he enters upon the trial and remains with the Defendant throughout the entire trial and during the examination into every fact and proposition to be proven by evidence by the State. This presumption of innocence is only overcome or overthrown when you, as a jury, find the proof is such as to exclude every reasonable doubt of the guilt of the Defendant.

Ohio Revised Code Section 2901.05, effective January 1st, 1974, provides:

"Every person accused of an offense is presumed innocent until proved guilty beyond a reasonable doubt and the burden of proof is upon the prosecution."

What is reasonable doubt? Reasonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not a mere possible doubt because everything [678] relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

This is a statutory definition, by the way, which we are required to read in every criminal case in the State of Ohio. You have been told through the course of this trial that you're to decide this case based upon the evidence.

What is evidence? Whenever reference is made to evidence upon which this case is to be decided, the jury will understand that we mean evidence, that is testimony from the witnesses, the exhibits admitted during trial, and any facts agreed to by counsel.

There were certain agreements known as stipulations. These stipulations were reached between the State and the Defendant and are to be accepted by you as facts. No further evidence need be brought in on this point. This is, likewise, applicable to anything the Court took judicial notice of. I believe in this case the only thing that was noted, that I took judicial [679] notice, was the fact that the board up here is not going with you to the juryroom, which was a rough schematic of the alleged crime scene.

Evidence, ladies and gentlemen of the jury, may be either direct or circumstantial or a combination of both. Direct evidence is testimony given by a witness who has seen or heard the facts to which he has testified. It includes the exhibits accepted as evidence during the trial and any stipulations. If a witness testified from personal

knowledge to the commission of an act to be proven or in order to establish a defense, this is called "direct, positive" or "eyewitness" evidence.

It is not always possible to ascertain the truth by evidence of this direct character; hence the law permits the introduction and consideration of what is called "circumstantial evidence." By circumstantial evidence is meant proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind, and which connected facts tend to show the guilt or innocence of the person charged with the [680] commission of a crime.

It is either by a process of reasoning, or as a result of common experience, you may conclude that when certain facts exist, certain other facts usually coordinate therewith. A conclusion so deduced or drawn from a proven fact or facts is what we refer to as an "inference."

In considering the evidence in this case, either direct or circumstantial, you may draw inferences from proven facts. You are instructed, however, that you are not permitted to base one inference upon another inference. Each inference must be predicated or based upon a proven fact or facts. Two or more inferences may be drawn from the same proven facts or additional facts in evidence, or circumstances in evidence.

In this case we have a combination of both direct and circumstantial evidence. In the absence of direct evidence circumstantial evidence by itself would justify the finding of guilt. If the circumstances are entirely consistent with the Defendant's guilt and are wholly inconsistent with any reasonable theory of the Defendant's innocence, and are so convincing as [681] to eliminate reasonable doubt of the Defendant's guilt, then you must find the Defendant guilty.

If the circumstances create inferences that are equally consistent with guilt or innocence, such inferences must be resolved in favor of the Defendant.

You, the jury, are the sole judges of the facts of the credibility of the witnesses and the weight to be given to the testimony of each witness. To weigh the evidence, you must consider the credibility or believability of each person testifying. You will apply the test of truthfulness which you apply in your daily lives.

You will recall the instructions I gave you at the commencement of the trial as relates to assessing the credibility of the witnesses. That would likewise include the Defendant, Earline Martin, in this case.

In determining the credibility of the witnesses, you should consider the interest or bias the witness has in the outcome of the verdict; his appearance, manner and demeanor while testifying before you; his candor and frankness; or lack of candor or frankness; the consistency of [682] his testimony with other known facts in the case; his accuracy of memory or inaccuracy of memory; his intelligence, or lack of intelligence; the reasonableness or unreasonableness of his testimony; the opportunity the witness had to see or hear or know the truth of the facts and circumstances concerning the things which he has testified; and any or all other facts and circumstances surrounding the testimony which, in your judgment, would add or detract from the credibility and weight of his or her testimony.

Applying these tests, you will assign to the testimony of each witness such weight as you determine proper. You are instructed that you are not bound to believe something to be a fact simply because it is testified to by a witness.

If you believe from all the evidence that such witness was mistaken or has testified untruthfully of such a fact, you are not required to believe the testimony simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness.

It is within your province as a juror to determine what testimony is worthy of belief [683] in the exercise of your honest and impartial judgment and what testi-

mony is not worthy of belief. As a matter of law, you may believe a portion of the testimony of a particular witness and disbelieve the rest of his testimony. You may believe all of the testimony of a particular witness or you may disbelieve all of the testimony of a particular witness.

You are instructed that one way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on a former occasion. If you find from the evidence that any witness has been impeached in this manner, you may take that into consideration in determining his credibility and the weight of his testimony.

Police officers have testified in this case. I say to you, that as a matter of law, you will give no greater or lesser consideration to their testimony merely because they are police officers; but you will apply the same rules for testing credibility concerning the weight to be given to their testimony as you would to any other witness.

One who follows a profession such as [684] a doctor and coroner, or one who follows certain other professions or line of work which, after years of practice, is supposed to make them skillful in their line of work, may express his or her opinion because of his or her education, knowledge or experience.

In this case we have received testimony from such witnesses which we sometimes classify and title "expert witnesses." This would include Dr. Challener, Sharon Rosenberg, Detective Pollutro and Sergeant Patrick Reynolds.

In addition to stating facts and findings, the so-called "expert witness" is permitted to state his or her opinion, based upon certain findings or alleged findings which he or she claims were made. Such testimony is admitted for whatever assistance it may provide in helping you to arrive at a just verdict. As with other witnesses, you alone have the duty of deciding what weight should be given to the testimony of such expert witnesses.

In determining its weight, you may take into consideration their skill, experience, knowledge, veracity, familiarity with the facts of the case, and the usual rules for testing [685] credibility in determining the weight to be given the testimony of the expert.

The mere fact that this witness may be following a vocation as a doctor or coroner or officer of a scientific unit does not warrant the jury in giving more, or for that matter, less credence to their testimony, but you should apply the same test to this testimony that you apply to the testimony of other witnesses in light of all the evidence and decide such weight or credence that you will give to such direct and opinion testimony. You are instructed, however, that such testimony is not to supplant, but rather to supplement your judgment.

There was evidence and testimony admitted as to statements and declarations allegedly made by the Defendant, Earline Martin. You should consider with caution testimony as to oral or written statements or declarations made by the Defendant. In weighing such evidence, you should consider whether the statements or declarations were made by the Defendant; whether it was truthful; whether it accurately reported; whether the witness testifying to such statements or declarations fully heard and understood what [686] was said. You should consider the circumstances under which it was made; the emotions that may have existed at the time; and the difficulty of contradicting any such statement.

However, upon you alone rests the duty of applying the general rules of testing the credibility of witnesses and deciding what weight should be given to any or to all or any part of such evidence.

By law, I have to read to you—I'm going to submit to you a copy of the written instructions. I want to also apologize for the manner in which it is written. It made reference to his as opposed to hers. Please give me that much leeway.

The Defendant, Earline K. Martin, is charged with aggravated murder. Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable doubt that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Walter Martin.

Before you can find the Defendant [687] guilty, you must find beyond a reasonable doubt:

1. That Walter Martin was a living person and that his death was caused by the Defendant in Cuyahoga County, Ohio, on or about the 21st day of July, 1983.

2. That the killing was done purposely and with specific intent; and

3. That the Defendant acted with prior calculation and design.

I used the term "purpose." This, by the way, is going to be applicable to both aggravated murder and the lesser included offense of murder. It is not applicable to the lesser included offense of voluntary manslaughter. I will explain that to you in a moment.

Purpose. Purpose to kill is an essential element of the crime of aggravated murder.

A person acts purposely when it is his or her specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the Defendant a specific intention to kill Walter Martin.

Purpose is a decision of the mind to [688] do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purpose with which a person brings about a result is determined from the manner in which it is done, the

weapon used and all the other facts and circumstances in evidence.

None of these factors, in and of themselves, are conclusive as to the Defendant's intent. But they may be considered together with all of the other evidence, whether such evidence was introduced by the prosecution to indicate the Defendant's intent or by the Defendant to indicate her lack of intent, in determining whether the Defendant specifically intended to cause the death of Walter Martin.

What then does "specific intent" mean? No person shall be convicted of aggravated murder unless she is specifically found to have intended to cause the death of another. Specific intent in Ohio is no more or less than a particular [689] intent prescribed by statute. This statute mandates that the jury must find that the killing was done purposely and with specific intent, and that the Defendant specifically intended to produce the death of Walter Martin.

If, ladies and gentlemen, a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon. Such inference is not conclusive, but may be accepted or rejected by you in your deliberations. If you accept such inference, then you must consider it together with the sum totality of all of the evidence, facts, and circumstances bearing upon the issue of intent.

"Cause" is an essential element of the offenses that you will consider, aggravated murder, murder and voluntary manslaughter. The State charges that the act of the Defendant caused the death of Walter Martin. Cause is an act which in a natural and continuous sequence directly produces the death of a person and without which it would not have occurred. Cause occurs when the death is a natural and foreseeable result of the act of the Defendant.

[690] Purpose is also an essential element of both aggravated murder and murder.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

What do we mean by "prior calculation and design?"

Prior calculation and design means the purpose to kill was reached by the Defendant through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan, involving studied consideration of the method and the means with which to kill another, or the instrument or weapon used to kill another.

No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill.

Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for [691] aggravated murder.

In determining the element of prior calculation and design, if you find that the State has proved beyond a reasonable doubt that the Defendant actually formed a purpose to kill and that her purpose was arrived at with prior calculation and design before she performed the act, that is sufficient for this element of aggravated murder.

This is in the indictment and I will explain this to you, or the verdict form, which indicates a gun specification.

Before you can make a finding as to the specification, you must find beyond a reasonable doubt that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant had a firearm on or about her person or under her control while committing the offense charged.

I will now define the word "firearm" under Revised Code 2923.11(B):

"Firearm means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or a combustible propellant. Firearm includes any [692] unloaded firearm and any firearm which is inoperable but which can readily be rendered operable."

What does "deadly weapon" mean?

A deadly weapon is any instrument, device or thing capable of inflicting death and designed or specifically adapted for use as a weapon or possessed, carried or used as such weapon.

A deadly weapon is an object or instrument which is capable of inflicting death. In determining whether the gun was used as a deadly weapon, you will consider its nature and its capability of being used to inflict death, and the manner in which you find it was used in this case.

The definition just read to you relative to a firearm and deadly weapon is applicable in a gun specification case and the verdict form as to this will be self-explanatory. There will be a gun specification attached to each of the crimes that you will be considering in this particular case.

If you find, ladies and gentlemen, that the State proved beyond a reasonable doubt [693] all essential elements of aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense.

If you find that the State failed to prove that the offense was done with prior calculation and design, but that the offense was nonetheless purposely caused, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser offense of murder.

The offense of murder is distinguished from aggravated murder by the State's failure to prove that the offense was caused with prior calculation and design. To constitute murder as a lesser included offense of aggravated murder, it must be established that on or about the 21st day of July, 1983, in Cuyahoga County, Ohio, the Defendant purposely caused the death of Walter Martin. Purpose and causation have previously been defined for you.

If you find that the State proved beyond a reasonable doubt all essential elements of the lesser crime of murder, your verdict must be guilty of murder and in that event, you will [694] not consider any lesser offense.

If you find that the State failed to prove any of the essential elements of the offense of murder, you must find the Defendant not guilty of murder and you will proceed with your deliberation and decide whether the State has proved beyond a reasonable doubt the essential elements of the lesser offense of voluntary manslaughter.

Voluntary manslaughter is knowingly causing the death of another while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation sufficient to incite one into using deadly force.

Now, ladies and gentlemen, you may consider from all of the evidence produced by either the State or the Defense, whether or not mitigating circumstances exist in this incident. Mitigating circumstances that you may consider are "sudden passion," or "sudden fit of rage." Sudden passion or sudden fit of rage can only arise as the result of serious provocation or brought on by the victim, and which is reasonably sufficient to incite the Defendant into using [695] deadly force. The sudden passion or fit of rage must be extreme, that is it must be great in nature and intensity and must exist at the time of the act or acts that caused the death of Walter Martin. Sudden passion or fit of rage must be brought on by serious provocation.

Provocation to be serious must be reasonably sufficient to bring on sudden passion or fit of rage. The provocation must be reasonably sufficient to incite or to arouse the Defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the Defendant into using deadly force, you must consider the emotional and mental state of this Defendant and the conditions and circumstances that surrounded her at that time.

Deadly force means any force which carries a substantial risk that it will proximately result in the death of any person.

In determining whether the Defendant was under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim, you should consider any creditable evidence whether offered by the State or the [696] Defense; that is, sudden passion or a sudden fit of rage is not an element of the offense, but it is a factual circumstance mitigating the culpable mental state of the Defendant and neither the State nor the Defense, has the burden of proof on this issue.

If you find that mitigating circumstances are present in this incident, you will then consider the lesser but included offense of voluntary manslaughter.

Voluntary manslaughter is knowingly causing the death of another.

You will recall that I defined for you, as relates to aggravated murder, purpose and prior calculation and design and specific intent. In any crime in the State of Ohio it has to be proved that the Defendant charged has a certain mens rea or culpable mental state. A culpable mental state, generally speaking, as related to aggravated murder, is what is called purpose or purposely. Culpable mental state is called knowingly, which I shall define for you. A person acts knowingly, regardless of his purpose, when she is aware that her conduct will probably cause a

certain result. A person has knowledge [697] of circumstances when she is aware that such circumstances probably exist.

Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the Defendant an awareness of the probability that the incident would occur.

Cause is an essential element of voluntary manslaughter. Cause is an act or failure to act which in the natural and continuous sequence directly produced the death of Walter Martin, and without which it would not have occurred. Cause occurs when the death is the natural and foreseeable result of the act.

A death is the result of an act or failure to act when it is produced directly by the act or failure to act in a natural and continuous sequence and would not have occurred without the act. "Result" occurs when the death is naturally and foreseeably caused by the act.

If you find that the State has proved beyond a reasonable doubt all the essential elements of voluntary manslaughter, to-wit: [698] Knowingly causing the death of another, you will find the Defendant guilty of voluntary manslaughter.

On the other hand, of course, if you find the State failed to prove its case beyond a reasonable doubt as to any one of the essential elements that I have instructed you on, you will find the Defendant not guilty.

Now, ladies and gentlemen of the jury, you have received instructions on aggravated murder, murder and voluntary manslaughter. It is your duty to first consider the charge of aggravated murder. If you find beyond a reasonable doubt that the State of Ohio proved the elements of aggravated murder, you may not go on to consider any of the lesser included offenses defined for you. If you find the Defendant not guilty of aggravated murder, or if you are unable, after a good faith effort, to

reach a verdict as to the crime charged, then and only then may you consider the lesser offense of murder. The same instruction is applicable should you go on to consider voluntary manslaughter.

Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. [699] In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter.

You have been instructed that you are the triers of the facts. You and you alone resolve the factual issues before you. Lesser included offenses are defined not to encourage compromise verdicts, but rather to define the applicable law dependent upon how you resolve the disputed facts.

The Defendant in this case has claimed the affirmative defense of self-defense, which I am about to define for you. As I have indicated to you, there are certain requirements as to elements of the crime that you may consider during the course of your deliberations. The burden of proof is upon the State to prove its case beyond a reasonable doubt. As required in the affirmative defense of self-defense, the burden of proof is upon the Defendant to prove self-defense by what we call a preponderance of the evidence. And I will define self-defense and likewise what a preponderance means.

The Defendant claims that what she did [700] was justified on the basis of self-defense.

To establish self-defense, the following elements must be shown:

The Defendant was not at fault in creating the situation giving rise to the argument; (2) the Defendant had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force; and (3) the Defendant must not have violated any duty to retreat or avoid the danger.

If the Defendant had reasonable grounds and an honest belief that she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was by killing her assailant, then she was justified even though she was mistaken as to the existence of such danger.

Resort to the use of a deadly weapon is not permitted because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon.

In determining whether the Defendant [701] had reasonable grounds for an honest belief that she was in imminent danger, you must put yourselves in the position of this Defendant, with her characteristics, her knowledge or lack of knowledge, and under the circumstances and conditions surrounded her at the time. You must consider the conduct of Walter Martin and determine if his acts or words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm.

Ladies and gentlemen, the law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances and if the force used so grossly disproportionate to her apparent danger as to show revenge or an evil purpose to injure her assailant, then the defense of self-defense is not available.

The Defendant must establish that the other party was the aggressor and that the Defendant did not herself provoke and cause the injury. The defense of self-defense is not [702] available to the person who starts a fight unless, in good faith, she withdraws from the contest and informs the other party of her withdrawal, or by words or acts reasonably indicates that she has withdrawn and is no longer participating in the fight.

The Defendant is not in the position to claim self-defense if she sought trouble and armed with a dangerous

weapon she provoked a fight that had broken off and did not attempt to avoid it or leave the scene of the trouble. Self-defense ceases under the circumstances, and I have already told you about some of them.

If, in the careful and proper use of her faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of her adversary's position was released from the danger, and the right to use force in self-defense ended. If thereafter the Defendant continued to fight, she becomes the aggressor and subsequent injury is unlawful.

The Defendant is not in a position to [703] claim self-defense if she sought trouble and she provoked a fight and did not attempt to avoid it or leave the scene of the trouble.

I have indicated to you that the burden of proof as relates to the elements that makeup self-defense is upon the Defendant, Earline Martin. The degree of proof is what we call by the proponderance of the evidence.

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or over-balances in your minds the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses. Consider all the evidence.

In determining whether or not an affirmative defense has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that affirmative defense regardless of who produced it.

If the weight of the evidence is equally balanced or if you are unable to determine [704] which side of the affirmative defense has the preponderance, than the Defendant has not established such affirmative defense.

As I told you before and I will tell you again, you may not discuss or consider the possibility of punishment. Your duty is confined to a determination of the guilt or innocence of the Defendant.

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.

Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the Defendant will feel their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything which you consider an indication of the Court's view of the facts, you are instructed to disregard it. This Court [705] will not invade the province of the jury as judges of the facts. I likewise ask you to give me the courtesy of not invading my area, which is relative to the law.

Your initial conduct upon entering the juryroom is a matter of importance. It is not wise to immediately express a determination or to insist upon a certain verdict because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

Consult with one another, consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment.

Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

Will the attorneys please approach [706] the bench?

(Thereupon, discussion was had between Court and counsel outside the hearing of the jury and off the record.)

THE COURT: Other than that mentioned at side-bar, is there anything else on behalf of the Defendant relative to this case?

MISS GAUGHAN: Nothing further on behalf of the State of Ohio.

MR. WILLIS: No, your Honor.

THE COURT: Before reviewing the verdict forms, I will ask all 12 members of the panel: Are you physically able to proceed to the deliberation in this case? You all have said yes. All 12 members have been here and are available are healthy and prepared to in fact deliberate this case. As a result, I am going to excuse Mrs. Ehlert and Mr. Bowen. I want to thank you for your services and your availability here. You will not participate in the deliberations of the jury. You are not to discuss this case or to tell anyone how you would have voted in this particular case.

Please recall the Court's admonition. Don't talk to anyone about this particular matter.

[707] (Thereupon the alternate jurors left the courtroom.)

THE COURT: I am going to give you a copy of that which I just read to you ladies and gentlemen. There are entries in here that refer to his as opposed to her. Please excuse me for that.

I am also going to ask the attorneys to examine all of the exhibits. You will receive all of the exhibits that you're entitled to receive, that were admitted into evidence. They may not be in chronological order, but believe me, they go from 1 through 11, or whatever. You will have all of them. If there were some that were not received and you may say, "Can we have that," that's

not an exhibit in the case. That was for a schematic purpose, to give you an idea of the alleged crime scene.

I will read to you the verdict forms, which you will find self-explanatory. Do not draw any inferences from the order in which I read here. They read as follows:

"State of Ohio, Plaintiff, versus Earline K. Martin, Defendant. Verdict. We the jury in this case being duly empaneled and [708] sworn, do find the Defendant, Earline K. Martin, —" then you have a blank space with an asterisk and we refer to the middle section of the verdict form. You will insert in ink, depending upon your finding, of course, the term "guilty," or "not guilty of aggravated murder of Walter Martin, a violation of RC 2903.01 as charged in the indictment."

Likewise, on each verdict form there is a further finding requested of the jury:

"We further find that the Defendant, Earline K. Martin, —" and you will find a double asterisk before a blank. You will insert in the blank space "did," or "did not have a firearm on or about her person or under her control."

In the event that you find the Defendant guilty of aggravated murder, you may waive your finding relative to the gun specification.

Further, as relates to these other two verdict forms: In the event, as I have indicated to you, you make your finding of not guilty as relates to aggravated murder, don't bother on this form with the gun specification finding; or in the alternative, if you have deliberated this case and maybe fail relative to [709] making a decision. one or the other on this matter, then you will then go to the next lesser included offense on the next form, which reads exactly the same, but it says, "murder," instead of aggravated murder.

You will insert the appropriate finding of guilty or not guilty and did or did not have a firearm.

The last verdict form should be identical to these verdict forms except for the offense which is voluntary

manslaughter. And likewise, you will insert your finding of guilty or not guilty and did or did not have a firearm. You will then sign the bottom portion of the verdict form.

When all 12 jurors agree on a verdict, complete the form which corresponds with your decision, all 12 jurors must sign the verdict in ink. The foreman or forelady will sign the jury form on the first line in ink. Then the other 11 of you people will sign in the remaining lines, when all of you have made a decision in this particular case.

After you retire to the juryroom, first select a foreman or forelady. The purpose [710] of the foreman or forelady is not to have more authority than anyone else. The foreman or forelady will see that your discussions are orderly and that each of you will have an opportunity to discuss your viewpoint of the case and the evidence as it was presented to you throughout the course of this particular trial. If during your deliberations there is a time you have a real problem, that is, if you wish to contact the Court, there is a buzzer on the wall that is available to call the bailiff to the juryroom.

There will be a pad and pen provided for you. If you desire to address any communication of any kind in reference to this case, you will reduce such communication to writing, signed by your foreman or forelady and then we will try to answer your questions.

When you have reached a verdict, the same instructions are applicable. Push the buzzer and it will let us know to come and get you. We will take care of your needs to any extent that we possibly can. I am going to have you deliberate for a period of time this evening. There is no way that anyone can tell how long a [711] jury is going to take to make a decision in any case.

Will the attorneys take a look at the verdict forms and would you like to examine the exhibits, please, when the jury is taken out of the room.

You will note, I have shown these to the representatives of the State and the Defendant, of course. Then I'm going to give it to you. They have some spelling errors in it. I have made an effort to correct them. Please bear with me as it relates to that. If you have any specific questions concerning this charge, again, put it in writing and we will take care of it.

Ladies and gentlemen, this case is now in your hands. Every time you're going to leave your room, whether only for a cup of coffee or whatever, recall the Court's admonition, you don't talk to anyone about the case until all 12 of you are together, seated in the room and deliberating this case. Thank you very much.

(Thereupon, at 4:10 p.m. the jury retired to deliberate.)

[712] (Thereupon, the following proceedings were had outside the presence of the jury and on the record as follows:)

THE COURT: Let the record show that prior to, but at the appropriate time, the Court did ask the parties to approach the side-bar to see if there was anything by way of additions or deletions concerning the charge. We did have a discussion concerning the charge.

I think, already on the record, prior, they have been given an opportunity and have received the charge prior to the final arguments. Specifically, Mr. Willis, do you want to put any specific objection that you have on the record?

MR. WILLIS: With reference to the Court's charge, I would except to the way in which the aggravated murder and murder charges were submitted. The Court indicated to the jury that they had to consider aggravated murder first. If they reached a conclusion that the Defendant was guilty of aggravated murder, they shouldn't go any further. They should return that verdict.

THE COURT: Relative to that charge—

MR. WILLIS: Especially in light [713] of the fact that the jury might take that to mean they don't even

have to consider whether or not the Defendant acted in self-defense.

THE COURT: I did charge this jury that as relates to all the charges, they may consider the Defendant's allegation that she was justified and that she had acted in self-defense. Your objection is noted.

MR. WILLIS: Thank you.

The same thing, of course, applies to the murder charge —the jury should consider all the evidence before attempting to reach their verdict in any particular charge. I again except as routinely to the fact—I say routinely, that I didn't refer, in my exception to the charge, that the statute unconstitutionally imposes the burden of proof on the Defendant to prove she's not guilty by reason of self-defense. That burden is placed on the Defendant. And to the extent that charge was submitted to the jury, I except to it. It's inappropriate in the context of the case.

Also, Judge, I want to note exceptions to certain segments of the Prosecutor's argument, which I think were inappropriate, giving her [714] opinion as to the numerous occasions that the Defendant was a liar. I don't think that's the prerogative of counsel for the State, to call anybody a liar. She talked about me using the word "liar," and characterized in the testimony, with regard to the State's witness. I did not use that word. I think that was inappropriate and I voiced my objection, which was overruled.

THE COURT: Some of which were sustained. But the Court at the time was satisfied that the Prosecutor in fact couched her arguments based upon the evidence.

MR. WILLIS: Thank you. My other objection is to the erroneousness of the statement. I think it is prejudicial and that's the reason why I did not make use of the statement made by Sadie, was intended to prove that what she said in the statement was consistent.

The other reason why I didn't cross examine her on the content of the statement, is because of what was stated in the statement was valid—something to that

effect. Erroneous. I didn't use the statement. The most prominent reason why I didn't use the statement, also, on cross-examination, was because the Court of Appeals [715] has ruled if you use even a piece of it, even the date, that makes the whole statement admissible. If you make any use of the prior written statement, the whole statement is in, as I understand from State versus Cirisullo and some of the other cases.

There are other contentions that if the statement would accurately reflect what the witness testified, would justify the non-use by Defense counsel. And I think that it is inappropriate, in light of that.

THE COURT: That particular portion of the argument, as I recall, was rebuttal to certain comments that you made on the cross-examination of various witnesses. Sir, you're aware of State versus Watson, where the Court of Appeals said the State would be remiss if it did not respond to that or—

MR. WILLIS: I remember that part of the argument. She incorporated the Court's direction to the witness as being a significant aspect of any assessment of her credibility. I think that in any instance whatever, the admonition the Court may give the witness should never be involved.

[716] THE COURT: The jury makes a decision based on what goes on in the four corners of this courtroom, as I remember. Also called upon to determine the credibility and to consider the candor and frankness or lack of it.

MR. WILLIS: I have no problem with that. Nothing further.

THE COURT: Anything on behalf of the State?

MISS GAUGHAN: Nothing further, your Honor.

[Certificate Omitted in Printing]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 48067

STATE OF OHIO, PLAINTIFF-APPELLEE

—VS—

EARLINE MARTIN, DEFENDANT-APPELLANT

JOURNAL ENTRY AND OPINION

Date of Announcement of Decision: Nov. 21, 1984

Character of Proceeding: Criminal appeal from Common Pleas Court, Case No. CR-184334

Judgment: Affirmed

Date of Journalization:

Appearances:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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RUSSO, J.:

The defendant appeals her conviction for aggravated murder (R.C. § 2903.01) with a gun specification.

Early in the morning of July 21, 1983, Earline Martin and her husband, Walter Martin, argued over grocery money.

Earline Martin claims that her husband struck her in the head during the argument. After going upstairs to wash and put on a robe, she came back down with her husband's gun, which, she maintains, she was going to dispose of. Her husband saw that she had something in her hands and questioned her about it. She claims that he came at her, and she lost her head and fired the gun at him.

Five or six shots were fired, and three struck Walter Martin, killing him.

On appeal, Earline Martin assigns five errors:

Assignment of Error No. I:

"The prosecutor was guilty of misconduct by expressing her personal opinion that the accused was 'lying' (R 651) and was a 'liar' (R 652)."

The prosecutor's remarks were made in closing argument as she summarized the testimony of the defendant and other witnesses in the case.

The key consideration becomes whether the remarks naturally induced the jury to judge the case by considerations not presented in, or suggested by, the evidence. *State v. Carver* (1971), 30 Ohio App. 2d 115, 129.

State v. Price (1979), 60 Ohio St. 2d 136 at 140, permits closing remarks on the credibility of witnesses, especially when such remarks do not constitute an invitation to the jury to go beyond the evidence presented at trial. See also *State v. Rutherford*, No. 43182 (8th App. Dist. Ohio, Oct. 22, 1981), unreported.

Here, the prosecutor's remarks were a characterization of evidence presented to the jury; they did not rise to the status of prejudicial error.

Accordingly, Assignment of Error No. I is not well taken.

Assignment of Error No. II:

"The court erred in giving, and the appellant was greviously denied due process by virtue of, the various constitutionally defective instructions under which the aggravated murder and the lesser included homicide offenses were submitted to the jury."

Assignment of Error No. III:

"The appellant in this case was denied due process when the trial court instructed the jury not to even consider any lesser included offense unless they first found the accused not guilty of the greater offense."

In her second assignment, the appellant argues that the court charged the jury to agree unanimously that she be found not guilty of aggravated murder before considering a lesser charge.

This contention is simply not borne out by the record. It is not plausible to construe the court's charge [1] as requiring a unanimous verdict of not guilty of aggravated murder before considering the lesser included offense. See *State v. Hemann*, No. 45091 (8th App. Dist. Ohio, March 17, 1983), unreported.

In her third assignment, the appellant again focuses on the court's charge to consider the aggravated murder first before considering the lesser included offense. She construes this to mean that the jury must acquit unanimously of the greater offense before considering the lesser, in violation of the rule of *State v. Muscatello* (1977), 57 Ohio App. 2d 231. Again, the record does not

[1] "If you find beyond a reasonable doubt that the State of Ohio proved the elements of aggravated murder, you may not go on to consider any of the lesser included offenses defined for you. If you find the Defendant not guilty of aggravated murder, or if you are unable, after a good faith effort, to reach a verdict as to the crime charged, then and only then may you consider the lesser offense of murder. The same instruction is applicable should you go on to consider * * *.

support this construction. See *State v. Wilson*, No. 45650 (8th App. Dist. Ohio, June 23, 1983), unreported.

Assignments of Error Nos. II and III are not well taken.

Assignment of Error No. IV:

> "The court erred, and it was in violation of due process, when the jury was charged that to prevail on her plea of self defense [sic] the accused was required to, in effect, prove she was not guilty."

This court dealt with a nearly identical assignment of error in *State v. Moran*, No. 45879 (8th App. Dist. Ohio, Oct. 27, 1983), unreported. The issue has been raised several times before: *State v. Jones*, No. 44983 (8th App. Dist. Ohio, March 31, 1983), unreported; *State v. Henderson*, No. 43489 (8th App. Dist. Ohio, Dec. 17, 1981), unreported; *State v. Walker*, No. 40586 (8th App. Dist. Ohio, May 30, 1980), unreported.

Once again, we outline the law on this point. Revised Code § 2901.05 places the burden of proof for an affirmative defense on the defendant. The affirmative defense must be proved by a preponderance of the evidence.

By the rule in *State v. Poole* (1973), 33 Ohio St. 2d 18, self-defense is an affirmative defense. *State v. Robbins* (1979), 58 Ohio St. 2d 74, sets out the three elements a defendant must satisfy to prevail on this defense.

As *Moran*, and the cases cited with it, hold, such a self-defense charge by the court to the jury is not violative of the appellant's due process rights.

Assignment of Error No. IV is not well taken.

Assignment of Error No. V:

> "The guilty verdict in this case is against the manifest weight of the evidence and is contrary to law."

It is a well-accepted principle of Ohio law that the weight to be given to the evidence and the credibility of

the witness is the duty of the trier of facts. A reviewing court may not reverse a criminal conviction where the record shows that the verdict of guilty returned by the jury was based on sufficient evidence. *State v. DeHass* (1967), 10 Ohio St. 2d 230.

The record contains sufficient evidence for the trier of fact—the jury—to have reached its verdict of guilty of aggravated murder. We will not disturb that verdict.

Assignment of Error No. V is not well taken.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Jackson, P.J., Concurs in Part
and Dissents in Part
(See Opinion attached)

Ann McManamon, J., Concurs

/s/ Basil M. Russo
BASIL M. RUSSO, Judge

(2)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate * * *.

JACKSON, P.J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority disposition of appellant's first, second, third and fifth assigned errors. I disagree with their disposition of appellant's fourth assigned error. This assigned error charges error by the trial court in its instruction to the jury that defendant must assume the burden of proving that she acted in self-defense in the killing of her husband, Walter Martin.

My position on this issue has been stated in *State v. Tuncle* (Cuy. Cty. Ct. App., March 8, 1979), unreported Case No. 38424, *State v. Wealthy Johnson* (Cuy. Cty. Ct. App., May, 1981), unreported Case No. 42846, dissenting opinion, and innumerable other dissenting opinions. Simply stated I am persuaded that the State is required to prove every fact necessary to constitute the crime charged. *Mallaney v. Wilbur* (1975), 421 U.S. 684. This rule was subsequently declared to be retroactive * * *. In *Patterson v. New York* (1977), 432 U.S. 197, the Supreme Court emphasized that while that State must bear the burden on those affirmative defenses which do not serve to negate any facts of the crime, the State may, consistent with due process, place the burden on the accused to prove any issue *which does not negate an element of the crime*, but may only mitigate the degree of criminality or punishment. This interpretation was adopted by the Ohio Supreme Court. *See State v. Long* (1978), 53 Ohio St. 2d 91, 93 n.2; *State v. Frost* (1979), 57 Ohio St. 2d 121, 125-127. *See also United v. Jackson* (6th Cir. 1978), 587 F.2d 852, 854, and *State v. Tuncle*, *supra*, at 6.

The affirmative defense of self-defense is one of those defenses which serve to negate a fact necessary to constitute the crime. Self-defense negates the fact of unlawfulness. An act committed in self-defense *is not unlawful*; it is not a criminal act. Moreover, Article IV, Section 20 of the Ohio Constitution requires every indictment

to allege that the crime charged was against the "peace and dignity of the State of Ohio." Finally, the indictment by which defendant-appellant, in the case at bar, was charged, includes the allegation that she "unlawfully" killed her husband, Walter Martin.

My position is constitutionally supported because, if the State were to attempt to make an act of self-defense a crime, it would violate Article I, Sections 1 and 4 of the Ohio Constitution as well as the Second, Fourth, Ninth and Fourteenth Amendments to the United States Constitution. *See generally State v. Hardy* (1979), 60 Ohio App. 2d 325.

Historically, self-defense has been considered to negate the unlawfulness element. *E.g., State v. Silvus* (1871), 22 Ohio St. 90; *State v. Stout* (1892), 49 Ohio St. 270. The effect of this was recognized by this Court in *State v. Gideon* (1977), 52 Ohio App. 2d 70, 74, where this Court stated: ". . . if an act which would otherwise be criminal is done in self-defense, the self-defense will excuse the unlawfulness of the act."

I am cognizant of the fact that Ohio Revised Code § 2901.05 states that ". . . the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused", and that the constitutionality of this requirement has been upheld by a decision from this Court. *State v. Davis* (1982), 8 Ohio App. 3d 205.

Nevertheless, I am convinced that Ohio Revised Code § 2901.05 is unconstitutional. I also note that *State v. Davis, supra*, made no mention of *State v. Tuncle, supra*, decided by this Court three years earlier, which held the statute to be unconstitutional. Until the United States Supreme Court or the Ohio Supreme Court specifically upholds the constitutionality of this statute, I shall adhere to my view that it is prejudicial error to place the burden of proof on an accused to establish by a preponderance of the evidence that he acted in self-defense. I respectfully dissent from the majority decision on this issue.

SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE

v.

MARTIN, APPELLANT

[Cite as State *v.* Martin (1986), 21 Ohio St. 3d 91.]

Criminal law—State may require defendant to prove affirmative defense of self-defense.

O.Jur. 3d Criminal Law § 1134.

R.C. 2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove an essential element of this offense. The state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense.

(No. 85-114—Decided January 15, 1986)

Appeal from the Court of Appeals for Cuyahoga County

OPINION

On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.

Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.

Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the

trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder. The trial court's charge included the following:

"Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter."

The jury found appellant guilty of aggravated murder with a gun specification, and the court sentenced her to life and a three-year term of imprisonment. On appeal, appellant claimed five assignments of error. First, appellant contended that the state unconstitutionally imposed upon her the burden of proving self-defense and that this, in effect, required her to prove her innocence. Second and third, appellant claimed she was denied due process of law when the trial court instructed the jury not to consider the lesser-included offenses unless and until it had reached a conclusion regarding the aggravated murder offense. Appellant further claimed that the verdict of guilty was against the manifest weight of the evidence. Finally, appellant claimed substantial prejudicial error in the prosecutor's closing remarks.

The court of appeals found these assignments of error not well-taken and affirmed appellant's conviction.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

John T. Corrigan, prosecuting attorney, and *Patricia A. Gaughan*, for appellee.

James R. Willis, for appellant.

CELEBREZZE, C.J.

I

Our first consideration concerns appellant's contention that the state of Ohio may not constitutionally place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged. Appellant asserts that self-defense negates the *mens rea* of aggravated murder and that requiring a defendant to prove self-defense thus compels the defendant to prove his innocence by disproving criminal intent. Since it is constitutionally impermissible to require an accused to prove his innocence, appellant contends that once a defendant produces evidence of self-defense, the prosecution must then disprove self-defense beyond a reasonable doubt.

We find no merit in this contention. R.C. 2901.05(A) clearly states that the burden of proving all elements of the offense charged including *mens rea*, beyond a reasonable doubt, is on the prosecution. This section also places the burden of proving an affirmative defense, by a preponderance of the evidence, on the accused. R.C. 2901.05 (C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." This court has long determined that self-defense is an affirmative defense. See *State* v. *Nolton* (1969), 19 Ohio St. 2d 133 [48 O.O.2d 119].

In the case *sub judice*, appellant was charged with the offense of aggravated murder. Thus, the state was required to prove beyond a reasonable doubt the elements of that crime, defined by R.C. 2903.01 as purposely, and with prior calculation and design, causing the death of another. Certainly no less can be required of the state because "* * * the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship* (1970),

397 U.S. 358, 364 [51 O.O.2d 323]. Appellant contends, however, that the Constitution requires more. Not only must the state prove the elements of the crime charged, appellant asserts, it must also disprove self-defense. We are unable to find support for this contention.

In *Patterson* v. *New York* (1977), 432 U.S. 197, the United States Supreme Court addressed a question very similar to that in the case *sub judice*. At issue was the constitutionality of a New York statute which placed upon the defendant the burden of proving the affirmative defense of extreme emotional distress. The *Patterson* court held that, consistent with due process, the prosecution was required to prove beyond a reasonable doubt only those elements included in the statutory definition of the offense charged. The recognition of an affirmative defense, the court stated, did not require the state to prove its nonexistence:

"We thus decline to adopt as a constitutional imperative, * * * that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Patterson*, *supra*, at 210.

The Supreme Court also recognized in *Patterson* that the obligation to disprove the existence of self-defense is a burden which the state, in its judgment, may properly deem too onerous to undertake in view of the fact that an affirmative defense is one involving facts peculiarly within the knowledge of the defendant, which he, not the state, may fairly be required to prove. This is exactly the view contained in R.C. 2901.05(C)(2).

The *Patterson* court also noted that there are affirmative defenses which do not seek to negate any of the elements of the offense which the state is required to prove. *Id.* at 206-207. This is the nature of self-defense under Ohio law. This court, in *State* v. *Poole* (1973), 33 Ohio St. 2d 18, 19 [62 O.O.2d 340], characterized the defense of self-defense as a "justification for admitted conduct." Self-defense represents more than a "denial or contradic-

tion of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *." *Id.* Rather, we stated in *Poole*, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. *Id.* Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged. In the case *sub judice*, the state proved beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the death of her husband. Appellant did not dispute the existence of these elements, but rather sought to justify her actions on grounds she acted in self-defense.

We therefore hold that R.C. 2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove any essential element of this offense. Thus, the state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense. Accord *State* v. *Moran* (Oct. 27, 1983), Cuyahoga App. No. 45879, unreported, certiorari denied *Moran* v. *Ohio* (1984), —— U.S. ——, 83 L. Ed. 2d 285.

Accordingly, the judgment of the court of appeals is affirmed on this issue.

II

Appellant next contends that she was denied due process of law when the trial judge instructed the jury not to consider the lesser-included offenses until it made a determination regarding the offense of aggravated murder. Although appellant argues that these instructions had the effect of preventing the jury from considering the

lesser-included offenses, we are not persuaded that this was the case.

This argument was previously rejected in *State* v. *Muscatello* (1977), 57 Ohio App. 2d 231 [11 O.O.3d 320], affirmed (1978), 55 Ohio St.2d 201 [9 O.O.3d 148], where we stated that a similar charge on voluntary manslaughter and its lesser-included offenses was not prejudicially erroneous. When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case *sub judice*, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Accordingly, this argument is without merit.

III

Appellant also challenges the jury's verdict as against the manifest weight of the evidence.

The standard for our review is whether, after viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia* (1979), 443 U.S. 307. Further, we must bear in mind that the weight given to evidence and judgment of the credibility of witnesses are in the province of the jury. A reviewing court may not reverse a judgment of conviction where the record shows a verdict based on sufficient evidence. *State* v. *DeHass* (1967), 10 Ohio St. 2d 230 [39 O.O.2d 366], paragraph two of the syllabus.

After a thorough review of the record, we are convinced that there was sufficient evidence from which the jury could find, beyond a reasonable doubt, that the elements of the crime of aggravated murder were proven beyond a reasonable doubt.

Several prosecution witnesses testified as to explicit threats made against the victim by appellant. Physical

and scientific evidence showed that appellant deliberately shot the victim several times at close range. The victim's attorney testified that the victim was visibly weakened after May 1983. According to a friend of the victim's daughter, this was the result of a heart attack and stroke which the victim suffered two months prior to the killing. Based on this evidence, the jury rejected appellant's claim of self-defense and found her guilty of aggravated murder.

Accordingly, we conclude that there is ample evidence in the record to support the jury's verdict. Consequently, appellant's contention is without merit.

IV

Appellant lastly contends that the prosecutor's remarks in closing argument, characterizing appellant's testimony as a fabrication, were substantial prejudicial error requiring reversal.

We begin our discussion by observing that it is improper for a prosecutor to express his or her personal opinion concerning the credibility of a witness.[1] We have also held, however, that "* * * the conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial." *State* v. *Maurer* (1984), 15 Ohio St. 3d. 239, 266.

This court recently considered a case involving prosecutorial misconduct in *State* v. *Smith* (1984), 14 Ohio St. 3d 13. There, we held that "* * * it must be clear beyond a reasonable doubt that, absent the prosecutor's

---

[1] DR 7-106(C) provides in part:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

"* * *

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

comments, the jury would have found [the] defendant guilty." *Id.* at 15.

Therefore, we must focus upon whether, aside from the prosecutor's remarks, the jury would have convicted appellant of the offense of aggravated murder. We have previously stated that the record reveals substantial evidence supporting the jury's verdict. We are convinced, beyond a reasonable doubt, that even absent the prosecutor's statements, the jury would have found appellant guilty.

Accordingly, we do not find reversible error in these remarks and affirm the judgment of the court of appeals.

Judgment affirmed.

LOCHER, HOLMES, DOUGLAS and WRIGHT, JJ., concur.

SWEENEY and C. BROWN, JJ., dissent.

SWEENEY, J., dissenting. Because I believe that R.C. 2901.05 unconstitutionally shifts the burden of proof of self-defense to the accused, I must respectfully dissent from Part I of the majority decision.

As was pointed out by Judge Jackson in the appellate court below, the affirmative defense of self-defense is one which serves to negate a fact that is necessary to constitute the crime charged. The "facts" that self-defense serves to negate are voluntariness and unlawfulness.

I believe it is clear that an act committed in self-defense is not unlawful in any event. Self-defense is not a crime; rather, it is an act of justification. The majority opinion fails to recognize the crucial difference between an affirmative defense of mitigation, such as that found in *Patterson* v. *New York* (1977), 432 U.S. 197, and an affirmative defense of justification, which is the essential nature of self-defense.

In *Patterson*, the affirmative defense of "extreme emotional disturbance" gave the accused the opportunity to show that his act of murder was, in reality, one of manslaughter. The affirmative defense of self-defense al-

leged herein, however, goes to the *mens rea* of the crime charged, *i.e.*, whether the act committed was indeed a criminal act. While *Patterson* involved a matter of the degree of the crime, the instant case involved the matter of whether the act committed was a crime *ab initio*.

While I do not quibble with the United States Supreme Court's analysis and decision in *Patterson* with respect to the affirmative defense it had before it, I do wish to re-emphasize that the legal efficacy of the *Patterson* decision with respect to the affirmative defense of self-defense was recently questioned in the case of *Engle* v. *Isaac* (1982), 456 U.S. 107, as is pointed out in Justice Clifford Brown's well-reasoned dissent.

Other jurisdictions have grappled with the issue of due process in this context, and there appears to be a distinct split of authority with regard to this issue. *Id.* at 122, fns. 23 and 24. Hopefully, the high court will resolve this judicial dilemma by granting *certiorari* in the cause *sub judice*.

In my view, R.C. 2901.05 amounts to an unconstitutional deprivation of due process in violation of the Fourteenth Amendment of the United States Constitution, and Section 16, Article I of the Ohio Constitution. This statute, along with the majority opinion herein, places the burden of persuasion on the accused that he or she committed an entirely lawful act—taking the life of another in self-defense. In this manner, the court has relaxed the standard that the state must prove every element of the crime charged beyond a reasonable doubt.

For these reasons, I would reverse the judgment of the court of appeals.

C. BROWN, J., concurs in the forgoing opinion.

CLIFFORD F. BROWN, J., dissenting. I must respectfully dissent from the majority's affirmance of the judgment of the court of appeals in this case.

I agree with the partial dissent below that R.C. 2901.05 is unconstitutional insofar as it places the burden of prov-

ing self-defense by a preponderance of the evidence on the accused. For more than a century, self-defense has been considered to negate the element of unlawfulness which must be present in order to convict a defendant of aggravated murder. See *Silvus* v. *State* (1871), 22 Ohio St. 90. Thus, R.C. 2901.05 permits the state to convict a defendant without proving every element of the crime charged, contrary to the principles of *Patterson* v. *New York* (1977), 432 U.S. 197.

I note that in the case of *Engle* v. *Isaac* (1982), 456 U.S. 107, 121-123, the Supreme Court of the United States, in *dictum*, interpreting Ohio law, recognized that the placement on the accused of the burden of proof of affirmative defenses such as self-defense raised a "colorable constitutional claim." There, the issue remained unresolved as not properly before the court. When the issue is properly before the court, I believe my position will be vindicated. Based on the foregoing, I would hold that R.C. 2901.05 impermissibly lessens the state's burden of proof and is thus unconstitutional as to the affirmative defense of self-defense.

Accordingly, I would reverse the judgment of the court of appeals.

SUPREME COURT OF THE UNITED STATES

No. 85-6461

EARLINE MARTIN, PETITIONER

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question IV presented by the petition.

April 21, 1986

Supreme Court, U.S.
FILED
JUL 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN

Petitioner,

v.

STATE OF OHIO

Respondent.

On Writ Of Certiorari To The Ohio Supreme Court

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a state can, consistent with the constitution, require an accused to bear the burden of proof on the issue of self-defense.

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OPINIONS BELOW

The Opinion of the Ohio Supreme Court is reported as *State* v. *Martin*, 23 Ohio St. 3d 91 (1986), and is set forth in the *Joint Appendix* to this Brief at pp. 36 to 45. The Journal Entry and Opinion of the Ohio Court of Appeals, which was not officially reported, is included in the *Joint Appendix*, at pp. 29 to 35. No opinion was delivered by the trial court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Ohio Supreme Court was entered on January 15, 1986. The Petition For Writ of Certiorari was docketed in this Court on March 4, 1986 and was granted on April 21, 1986.

The jurisdiction of the Court rests upon Title 28 U.S.C., § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are set out in the Addendum to this Brief at pp. Add.1 to Add.3. Those being referred to are:

(1) United States Constitution—Amendment XIV.

(2) Constitution of the State of Ohio—Article I, Section 1; Article I, Section 4; Article 4, Section 20.

(3) Revised Code of Ohio, § 2903.01.

(4) Revised Code of Ohio, § 2903.02.

(5) Revised Code of Ohio, § 2903.03.

(6) Revised Code of Ohio, § 2901.05.

(7) Revised Code of Ohio, § 2901.21 (A) & (C).

(8) Revised Code of Ohio, § 2929.71.

STATEMENT OF THE CASE[1]

Earline Martin, the petitioner herein, was found guilty by a jury "as charged by the Judge" of Aggravated Murder (under favor of R.C. of Ohio, §§ 2903.01 and 2929.71). She was given a life sentence. The appeal on questions of law from the verdict and final order entered by the trial court resulted in an affirmance of her conviction and the sentence imposed.

The facts in this case, as distilled by the Ohio Supreme Court, show that:

> On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.
>
> Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim had struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.
>
> Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first

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[1] The citations to *State* v. *Wealthy Johnson* and *State* v. *Tuncle* are to unreported decisions by our Court of Appeals. Both of these Opinions have been lodged with the Court.

> found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder.

J.A. at 36-37; 21 Ohio St. 3d, at 91-92.

The Record also shows the trial court, despite our very precise objections and exceptions, instructed the jury that to prevail on the basis of her self-defense plea, our petitioner was required to actually prove her innocence. Here reference is being made to the following segments of the Court's self-defense instructions by which Earline Martin was victimized:

> The Defendant in this case has claimed the affirmative defense of self-defense, which I am about to define for you. . . . As required in the affirmative defense of self-defense, *the burden of proof is upon the Defendant to prove self-defense* by what we call a preponderance of the evidence.
>
> * * *
>
> To establish self-defense, the following elements must be shown:
>
> The Defendant was not at fault in creating the situation giving rise to the argument; (2) the Defendant had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force; and (3) the Defendant must not have violated any duty to retreat or avoid the danger.
>
> * * *
>
> *The Defendant must establish that the other party was the aggressor* and that the Defendant did not herself provoke and cause the injury.
>
> * * *

> I have indicated to you that *the burden of proof as relates to the elements that makeup self-defense is upon the Defendant, Earline Martin.* The degree of proof is what we call by the preponderance of the evidence.
>
> * * *
>
> *If the weight of the evidence is equally balanced* or if you are unable to determine which side of the affirmative defense has the preponderance, *then the Defendant has not established such affirmative defense.*

J.A. at 19 to 21. (Emphasis supplied.)

SUMMARY OF THE ARGUMENTS

History could very well record that the selection of this particular case to resolve the issues here involved was both, wise and timely. For the issue as to whether a State can require an accused to prove their innocence when they defend solely on the grounds of self-defense could not have gone away simply because the Ohio Supreme Court, in a five to two decision, has apparently satisfied itself that such is the case.

Moreover, the aptness of the Court's selection of this particular case will be applauded by those of us who are convinced the Ohio Supreme Court and its various Appellate Courts (including the one below) are dead wrong in their analysis of these issues. Indeed, the express reliance in majority Opinions on *State* v. *Moran*, infra, is really a godsend because of the misguided focus it gives to our self-defense arguments. Significantly, our Court of Appeals specifically recognized that it had already "dealt with a nearly identical [issue] in *State* v. *Moran*, No. 45879 . . . ." (J.A. at 32). And, the Supreme Court of Ohio likewise cited *State* v. *Moran* in support of its ultimate

thesis (*id.*, at 40; *State* v. *Martin*, 23 Ohio St. 3d, at 94), which fact should weigh heavily in the direction of a resolution of this cause in favor of our petitioner.

It was, of course, in *Moran* v. *Ohio*, ___ U.S. ___, 105 S.Ct. 350 (1984), that counsel apparently got the attention of some of the members of this Court. For it was here that Justice Brennan, in a dissent from the denial of certiorari, articulated an analysis of this issue that can be favorably compared to that urged in the various dissenting opinions rendered in the reviewing Courts below. It is substantially this same position that our petitioner has taken in her discussions of these various issues.

While no abridgement of the specific analysis being referred to can do it justice, the following selected segments from *Moran* seem especially apt:

> The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code § 2903.01(a) (1982). Under Ohio law, an assertion of self-defense requires proof *inter alia* that the defendant "was in *imminent* danger of death or great bodily harm." *State* v. *Robbins*, 58 Ohio St. 2d 74, 388 N.E. 2d, 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design." (*Id.*, at 353.)
>
> * * *
>
> To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was

> done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted of an immediate response to a murderous attack upon him. See *Patterson*, supra, at 210; *Solem* v. *Helm*, 463 U.S. 277 (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge—an element required by the Constitution even if not by the State's enacted or decisional law.

Moran v. *Ohio*, ___ U.S. ___, 105 S. Ct., at 354-355. (Dissenting Opinion.)

When we add to the above quote this Court's recent decision of *Francis* v. *Franklin*, ___ U.S. ___, 105 S. Ct. 1965 (1985), which makes an analysis similar to the ones made in the *Moran* dissent and by the dissenting Judges on the Courts below, the die seemingly has been cast. And, this in favor of an outright repudiation and rejection of the self-defense theories espoused by the majorities below.

Another argument made below will contend that from a simple analytical prospective it seems clear enough that when one claims self-defense against a murder charge, he does not necessarily concede that he intended to kill. Here, of course, our reference is to the statement in *Martin* that, in raising the defense with which we are here concerned, the accused "*admits* the facts claimed by the prosecution and then relies on independent facts or circumstances which . . . [he or she] claims exempts . . . them from liability" (J.A. at 40; 23 Ohio St. 3d, at 94). (Emphasis supplied.)

The apparent flaw in the postulate set forth above will be shown to be its failure to recognize that while "one can

shoot to kill in self-defense," they can also "shoot to wound in self-defense, shoot to frighten in self-defense, or even shoot reactively with no specific purpose," *Mason* v. *Balkcom*, 669 F.2d 222, 227 (5th Cir. 1982).

A most critical premise for the arguments made in this Brief recognizes it to be a fact that forcing a defendant to bear the burden of proof on the issue of self-defense is, both, conceptually and functionally, the same as requiring the State to prove the lack of self-defense. Because of the danger that *Winship* could be circumvented if a State were free of constitutional restraints in defining crimes and allocating burdens of proof and the like, it is here being contended that the required analysis cannot turn simply on what the State may label as an affirmative defense or exclude as an element of an offense. Rather, the apt questions should seek a determination as to whether any such labels as the State may use in these situations increases the defendant's burdens or lessens, or eliminates, the State's burden of proof on an issue that is critical to criminal culpability.

ARGUMENT NO. I

A State Cannot Constitutionally Require Accused Persons Who Defend Against A Homicide Charge Solely On The Grounds Of Self-Defense To Prove Themselves Not Guilty.

Our analysis here starts and ends with an idea that is yet to be rejected by this Court—that is, that a State may not, consistent with the due process clause, impose on a defendant in a criminal trial, the burden of persuasion with respect to the plea of self-defense. At the heart of our various contentions is our belief that the constitutional limitations on the allocation of a particular burden of persuasion with reference to what a State may characterize and manipulate as "affirmative" defenses derive

from the rule articulated in *In Re Winship*, 397 U.S. 358, 364 (1970). There this Court held that a defendant in a criminal case may not be constitutionally convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.

Under this principle the concept of self-defense (because it brings into question, or seeks to negate, an element of the crime charged) must be disproven beyond a reasonable doubt. *Patterson* v. *New York*, 432 U.S. 197, 202-205 (1977). Additionally, simple logic supports the idea that the State "may not place the burden of persuasion on [an] issue upon the defendant if the truth of the defense would necessarily negate an essential element of the crime charged." *Holloway* v. *McElroy*, 632 F.2d 605, 625 (5th Cir. 1980).

Counsel's serious disagreement with the *ad hoc* reasoning patterns relied on for the arguments made in the opinions below, *i.e.*, that the lack of self-defense is not an element of the charged offense, should be viewed as total. Indeed, our position is that surely this Court could have only intended *Patterson* v. *New York*, to be properly regarded as dealing with defenses of mitigation, such as heat of passion and duress, which go only to the distinction between Murder and Manslaughter. Yet, despite this apparently valid thesis, the *majority* opinions below show an obvious refusal to reckon with the critical distinction between defenses in mitigation *and* those of justification—such as the claim of self-defense.

This analysis takes us then to the opinion made by our Supreme Court in *State* v. *Martin*. This case, to be sure, is now being regarded by the Courts in Ohio as conclusive support for the flawed thesis that the State *can* with impunity constitutionally require an accused to prove he

or she acted in self-defense. Cf., *State* v. *Jackson*, 22 Ohio St. 3d 281 (1986), decided two months after *Martin*. Also see *White* v. *Arn*, 788 F.2d 338, 344 n.8 and 345 n.10 (6th Cir. 1986) and *Wilson* v. *McMacken*, 786 F.2d 216, 219 (6th Cir. 1986). The fact that the asserted basis for the untenable positions taken therein is said to be *Patterson* v. *New York*, is, of course, rather startling. This is so because it can hardly be that *Patterson* is properly regarded as authorizing Ohio to punish as a murderer one who commits an entirely lawful act—that is, kill another in self-defense. Even this is not all. It is most difficult to understand how principles established in connection with mitigation defenses can be deemed controlling in a self-defense analysis. Yet, such was deemed to be the case by our Court of Appeals in *State* v. *Davis*, 8 Ohio App. 3d 205 (1982).

A study of the analysis made by these Courts (including the various cases relied on to defend their thesis) quickly shows it distills into an unconstitutional concept. Simply stated, the clear cut indications are that the Ohio Courts have somehow convinced themselves what is to be regarded as elements of *any* crime can be freely assigned by our Courts or by our legislature. And, these Courts must likewise be convinced that *Patterson*, although based on a *gratuitous mitigation defense*, which was the product of legislative grace, controls even where the defense raised is an absolute one as distinguished from merely a partial defense.

To be sure, self-defense is *not* as was said by our court of Appeals in *State* v. *Davis*, 8 Ohio App. 3d at 209, a "confession and avoidance" type defense as was the case in *Patterson*. It is this indelible fact that the Ohio courts are apparently unwilling to fully credit. On the other hand, if our Courts are right, and the State simply by the way it

defines a particular crime can make an element out of the lack of intent, or the lack of an act, or even mis-identification, then indeed it can even make it a crime to kill in self-defense. On the other hand, arguably it has already come very close to doing just that by making it an offense to simply cause a death—which is what happens in most self-defense homicide cases. See R.C. of Ohio, § 2903.02.

At the risk of sounding somewhat trite, it is fundamental due process that renders it impossible for, either, the Ohio Legislature or its Courts to make it a crime to kill in self-defense. While this is certainly true, a *majority* of the members of the Ohio Supreme Court and our Court of Appeals seem totally oblivious to the fact that this court in *Patterson* (upon which both claim to rely) issued the stern warning that it did "not intend *Mullaney*" to be "[c]arried to its logical extreme . . .", *Patterson* v. *New York*, 432 U.S., 214-215, n.15. Indeed, despite the above indicated cogent language, the Courts below were seemingly quite willing to take the *Patterson* rationale even *beyond* its "logical extreme." Also see, *State* v. *Davis*, 8 Ohio App. 3d 205 (1982). Cf., *State* v. *Gideon*, 52 Ohio App. 2d 70, 74 (1977), with the unreported decisions by our Court of Appeals in *State* v. *Johnson* (Cuy. Cty. Ct. App. 1981), Case No. 42846 and *State* v. *Tuncle* (Cuy. Cty. Ct. App. 1979), Case No. 38424. (The *Johnson* and *Tuncle* decisions have been lodged with this Court.)

Our point here, simply put, is that if Ohio can require a defendant to prove self-defense simply by the way it defines the crime involved, and if self-defense can be properly analogized to the gratuitous defense involved in *Patterson* (which defense arguably could be totally eliminated by the simple device of abolishing the statute that created it), then it follows Ohio could actually eliminate the defense itself and make it a crime to kill in self-

defense. If this is so, then surely this Court should make that point very clear to those of us who had regarded the right of self-defense as being the one right that was truly "inalienable."

Another point that should be noted here is that prior to the Ohio Supreme Court's decision to review this case, counsel had routinely made the argument that it was most unfortunate they had not ruled directly on the issue as to whether an accused can be required to prove himself not guilty when self-defense is raised. It was originally our hope that the Ohio Supreme Court would surely credit the following insuperable analysis, which is being submitted to this Court. *First*, the mere fact that one fires a gun and thereby kills another does not, alone, establish his guilt of any criminal offense. *Next*, "murder" and "manslaughter" are specific intent crimes. The intent involved in those crimes must be proven beyond a reasonable doubt by the prosecution. More simply put, the intent required to be proven must surely be a *criminal* intent. See *United States* v. *Corrigan*, 548 F.2d 879 (10th Cir. 1977) (". . . The defense of self-defense is directed toward negating the element of criminal intent," *id.*, at 883).

Viewed in this light, it makes no sense to argue that Earline Martin could rightly be required to prove that she lacked criminal intent or suffer a guilty verdict. Since the prosecution's burden is always to prove guilt (including the element of criminal intent) beyond a reasonable doubt, that burden is necessarily diluted unless the prosecution is required to prove the existence of such intent. Undeniably then, the criminal intent aspect of any felonious homicide is irreconcilable with self-defense. This being so, it follows that requiring one to disprove criminal intent offends fundamental criteria. *Isaac* v. *Engle*, 646 F.2d 1129, 1136 (6th Cir. 1980) (concurring opinion).

Based on the above analysis, what must be credited here is the fact that Earline Martin never contended she did not intend to shoot the decedent. Rather, it was maintained she shot *without* any criminal intent. See, *Morissette* v. *United States*, 342 U.S. 246 (1952), where this Court reasoned that the admittedly intentional act of taking certain government property could not be supposed by the Court to have been the only intent involved. Further, this Court reasoned that the intent the accused admittedly had was only criminal if it was so determined after a consideration of all the testimony (including the defense evidence that the taking had not been with any criminal intent) and all of the acts and circumstances surrounding the taking. *Id.*, at 276. Also see, *United States* v. *Gypsum Co.*, 438 U.S. 422, 429-430 (1978), and *Holloway* v. *McElroy, 632 F.2d 605, 618 (5th Cir. 1980).*

Even this is not all. Our Court's reliance on *Patterson* as authorizing the evisceration of the concept of self-defense, cannot survive for other equally cogent reasons. First it should be noted that the murder statutes under which *Patterson* was tried expressly provided:

> [I]t is an affirmative defense [to murder] that: (a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.

People v. *Patterson*, 39 N.Y. 2d 288, 347 N.E. 2d 898, 900 n.1 (1976). We also know from the State Court's Opinion in the *Patterson* case that:

> [t]he [trial] court instructed the jury that '[t]he fact that homicide was committed under the influence of extreme emotional disturbance constitutes a *miti-*

> *gating* circumstance reducing murder to manslaughter in the first degree.'
>
> The court went on to explain that '*[t]his does not mean that the emotional disturbance exonerates the killer*, or renders his killing guiltless. As long as he actually intended to cause the death of another person * * * the killing remains a crime, and remains a homicide, but is punishable in less severe manner than murder.'

Id., at 347 N.E. 2d, at 901. (Emphasis supplied.)

It is clear then that only by resort to arbitrary reasoning patterns, such as those articulated in the Courts below, especially by the Ohio Supreme Court (J.A. at 36; 23 Ohio St. 3d, at 93), does one fail to recognize there is no valid way to effectively analogize the murder-manslaughter relationship created by the New York statutes to Ohio's murder and manslaughter statutes. The same is true of the relationship between Ohio's homicide concepts and the inalienable right of self-defense that is part of our rich heritage. Having said that, it may suffice here to note that in New York (and this was the point critically addressed in *Patterson*, and made most clear by the above quotes from the jury charge given in the trial of that case) an accused by proving he acted under an extreme emotional disturbance only reduces his crime from murder to manslaughter, *Id.*, 432 U.S. at 205-206. For our part, it is this cogent point that most of the judges in Ohio (including those who decided *Martin*) simply refuse to reckon with.

Indeed in our judgment, the point made by Judge Jackson, one of the dissenters below, could not be better stated than was done by him in *State* v. *Wealthy Johnson* (Court of Appeals, Cuy. Cty. No. 42846, unreported). There it was stated:

> "We live in a time of increasing violence and crime. Justice Rehnquist recently observed that the law enforcement authorities 'cannot protect the lives of employees of this very court [The United States Supreme Court] who live four blocks from the building in which we sit . . .' *Coleman* v. *Balkcom*, [451] U.S. [949], (dissent from denial of certiorari). Yet under the position taken by the majority any of these employees, even the Justices themselves, if attacked by a criminal who they killed in self-defense, would be required to prove their innocence. We are also informed that the police of this country are themselves endangered and forced to kill hundreds of individuals a year in self-defense. . . . Under the majority's concept of the issue each of the police are subject to indictment for murder and released only if they can prove their innocence. We know that individuals are assaulted daily in our city and that the use of self-defense may in many instances be the only way to preserve the life of the law abiding citizen. Yet, the clear import of the majority decision as I read it, holds that such a citizen, acting in self-defense, must carry the burden of proving that he acted in self-defense, or be found guilty. In my humble opinion, this is contrary not only to the Ohio and United States Constitutions, but also to logic and common sense.
>
> "I am reconciled to the possibility in the present judicial climate that the position of majority in the case at bar may prevail: that citizens will lose their inalienable right of self-defense, or that, when acting upon the lawful exercise of that right, they will be required to prove their innocence. Nevertheless, if that position does prevail, it will do so without my support and over my most vigorous dissent."

Id., Dissenting Opinion. (Cited with approval by the author thereof in his dissent in Appellate Court's review of this cause, J.A., at 34.)

The point made above by our Judge Jackson really crystallizes the inaptness of the reasoning resorted to by the Ohio Supreme Court in their resolution of this petitioner's appeal in *State* v. *Martin* and in its lineal descendant *State* v. *Jackson*, both *supra*. Obviously if the reasoning relied on by those Courts is sound, then this Court really ought to say so in no uncertain terms. But, of course, this is not likely to happen for this Court will quickly realize that while arguments based on analogy are usually appealingly simple, at best such arguments, rather than prove anything, only enlighten and clarify. Thus they really should be used as a reinforcement for other and better reasoned arguments.

A. By Asserting The Defense Of Self-Defense An Accused Does Not, And Cannot Be Required To, Admit The "Facts Claimed By The Prosecution".

From a historical prospective, one can note that the elements of Ohio's First Degree Murder statute, which were superseded by the Aggravated Murder statute Earline Martin was convicted of (*i.e.*, R.C. of Ohio, § 2903.01), did contain a malice element. The statute being referred to contained the added element of "deliberate and premeditated malice." R.C. of Ohio, § 2901.01. (Page's 1953.) See *State* v. *Jenkins*, 48 Ohio App. 2d 99, n. 1 (1976). What is, of course, most obvious from the present statute (in addition to a redefinition and restructuring of the comparable homicide offenses involved) is the very substantial lessening of the burden of proof the prosecution must satisfy to convict one accused of committing the most serious of the State's criminal offenses. While this is obviously so in any homicide case, it is all the moreso when one defends solely on the grounds of self-defense. In our judgment, it is here that the flawed reasoning patterns adopted by the Ohio Courts are most manifest.

At least this much seems certain, "proof of self-defense would clearly negate . . . [any] malice element" of murder. *Hopper* v. *Perini*, 641 F.2d 444, 446 (6th Cir. 1980). With that as a given, one really gets a measure of significantly relevant insight into what may be the real cause of the obvious confoundment evidenced in the opinions below affirming the conviction under review in this cause. Here our reference is to what started out as a *dictum* in *State* v. *Poole*, 33 Ohio St. 2d 18 (1973), and which was ultimately gospelized into an absolute in *State* v. *Davis*, 8 Ohio App. 3d 205 (1982), before being arbitrarily converted into a major premise for the opinion in *State* v. *Martin*—which is under challenge in this cause. Obviously then it is because *Martin* is now being regarded as a resolution of all debates on this issue in Ohio that this Court must literally impose its wisdom on the debaters.

Indeed it was in *Poole*, where the defense raised was that of accident, that the Court's analysis included the collateral characterization of self-defense as "justification for admitted conduct." *Poole*, 33 Ohio St. 2d at 19. This theme was then repeated in other cases including *State* v. *Davis*, where the author thereof described the defense (of self-defense) as being:

> . . . in the nature of a confession and avoidance, by which the defendant essentially admits the existence of facts which tend to establish the elements of the crime.

Id., at 209. Then along came the two *Martin* decisions, which are at the core of this cause.

In *Martin*, the Ohio Supreme Court, relying on *Poole*, has now declared that whenever self-defense is raised the accused

> . . . admits the facts claimed by the prosecution and then relies on independent facts or circumstances

> which the defendant claims exempt him from liability.

J.A. at 40; 21 Ohioi St. 3d, at 94. It is from these false premises that the Court in *Martin* then pontificates:

> Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged.

Ibid.

If this Court agrees that an accused does not necessarily admit, and surely did not admit in this case, the "facts claimed by the prosecution and then relie[d] on independent facts, to exempt . . . [her] from liability" (*Id.*, 40 and 94); then almost at once the course this case must take becomes even clearer than it might have been otherwise—if that is even possible.

This follows because to the extent the jury regarded Earline Martin as having *conceded* her acts amounted to murder unless she proved they were lawful, by reason of self-defense, then such must be viewed as having "undeniably created a burden-shifting presumption." *Francis* v. *Franklin*, ___ *U.S.* ___, *105 S.Ct. 1965 at 1973 (1985). Also see Griffin* v. *Martin*, 785 F.2d 1172, 1179-1180 (4th Cir. 1986).

Here we rely on several cases that make a most critical point, of rather cogent import, as providing formidable support for our thesis. The first of these cases is *Mason* v. *Balkcom*,[2] *669 F.2d 222 (5th Cir. 1982)*, where the Court

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[2] Another point made in *Mason* v. *Balkcom*, seems clearly to fit within the ambit of R.C. of Ohio, §2901.01 (c), which defines reflex actions as being "involuntary acts." In *Mason* it was recognized that one can shoot "reactively in self-defense with no specific purpose" (*Id.*, at 227). Also see *State* v. *Hardy*, 60 Ohio App. 2d 325, 329 (1978) and *Stoffer* v. *State*, 15 Ohio St. 47, 52-53 (1869).

addressed the contention that "by raising self-defense the defendant admitted the intent to kill" (*id.*, at 227). In very specifically rejecting this argument the Court agreed that one raising the claim of self-defense only admits in the usual case "that the killing occurred," *id.*, at 227. The other case referred to is *Ramirez* v. *Jones*, 683 F.2d 712 (2d Cir. 1982), where the Court similarly rejected the argument that "by asserting the defense of self-defense the [accused] conceded his intent [was] to kill . . ." (*Id.*, at 716).

In our case, the Ohio Supreme Court has openly declared that even more than the isolatable element of "intent to kill," which was likewise present in our case, that by claiming she acted in self-defense Earline Martin *admitted* all the other elements of the prosecution's theory as well. How this can be squared with, either, the cases cited above and being relied on by petitioner, or with fundamental criteria, will surely make even less sense *after* we receive the benefit of the State's rationalizations on the central issues in this cause.

B. Due Process Is Violated When On The Basis Of The Instructions Given The Jury The Accused Could Be Convicted As A Murderer When It Was Just As Likely He (Or She) Acted In Self-Defense.

Perhaps the most critical of all points made throughout this Brief are those made under this segment of our argument. What these points show is that it is certainly one thing for a reviewing Court to reason (as this Court did in *Patterson*) that due process is not offended when a jury convicts one as a murderer when it is just as likely they were only guilty of a lesser charge. Whereas, it is quite another for a trial judge to actully tell a jury they *must convict* even if the evidence is in equipoise on the issue of self-defense. This, of course, is actually what

happened here. For our jurors were precisely told that if they had any doubt that Earline Martin had sustained her burden of proof on the self-defense issue, then she failed to sustain it and their verdict should be guilty. Specifically the jury was instructed that:

> "If the weight of the evidence is equally balanced or if you are unable to determine which side of the affirmative defense has the preponderance, then the defendant has not established such affirmative defense."

J.A. at 21.

What makes all this so very graphic is the awareness that the imposition of the burden of proof on Earline Martin to prove she acted in self-defense made it possible for the jury to convict her even if it had a reasonable doubt on the issue of the lack of self-defense.

Equally important to this analysis is what is being regarded as a fair distillation of the single most critical holding in this Court's decision in *Patterson* v. *New York*. Specifically it is being contended that the reason there was no due process violation in convicting an accused of murder who just as likely (or not) was acting under the compulsion of extreme emotional disturbance, was because extreme emotional disturbance was not an element of the crime of murder as the same was defined in the New York statute.

Now what happened in our case is the trial judge, despite the defense objections and exceptions, expressly and unequivocally instructed the jury (as our statute, R.C. of Ohio, § 2901.05 [A] & [C] [2], requires) that the burden of proving the homicide here involved was committed in self-defense was upon the accused. On this specific point we again premise our arguments on *In Re*

Winship, 397 U.S. 358 (1970), which verifies the constitutional parameters as to the allocation of burdens of proof. It has been on the basis of our analysis of *Winship* and its lineal descendent (*Mullaney* v. *Wilbur*, 421 U.S. 684 [1975]) that, despite the contrary positions expressed by our Courts in countless other cases, and by the Sixth Circuit, we have remained strongly convinced the reliance on *Patterson* for their ultimate thesis is sorely misplaced.

As shown elsewhere, in *Patterson* the Court dealt with a New York statute that provided a gratuitous mitigation defense to an intentional killing. This defense required a defendant to show he had "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation and excuse." A killing "under [such] circumstances . . . [did] not constitute murder because . . . [it was done] under the influence of extreme emotional disturbance," which was in turn defined by a New York statute as manslaughter. (*Id.*, 432 U.S., at 198-199.) Significant here, the New York Court of Appeals had originally held there was no shifting of the burden of proof in requiring the accused to prove his crime was manslaughter—instead of murder. This was said to be so because to maintain such defense, the accused was not required to disprove any fact essential to the offense charged. So postured, the affirmative defense made in mitigation bore no direct relationship to any element of the crime of murder.

It was the above analysis that doubtless caused this Court to conclude that:

> "If the State . . . chooses to recognize a factor that *mitigates the degree of criminality or punishment*, the State may assure itself that fact has been established with reasonable certainty. To recognize at all a

> mitigating circumstance does not [the court stated] require the State to prove its nonexistence in each case in which the fact is put in issue. . . ."

Id., at 207. (Emphasis supplied.) The above analysis shows this Court in *Patterson* was only dealing with a defense that mitigated the severity of the charged offense. Stated another way, there was no contention in *Patterson* that the killing was lawful. By way of contrast whenever self-defense is the issue the contention is made that the killing was *lawful*.

Simply put then, when self-defense is raised, the accused does not seek, in the words of *Patterson*, to demonstrate "a factor that mitigates the degree of criminality or punishment" (*Id.*, 207). And, just as surely, when self-defense is raised (contrary to the situation in *Patterson*), the defense being claimed bears a direct relationship to one of the elements of the crime charged—that is, that the killing was unlawful.

Also, as we read *Mullaney* v. *Wilbur*, 421 U.S., at 698, it seems clear enough this Court did not intend that its holding in *Winship* was limited to a State's definition of the elements of its crimes. If it were otherwise, the Court would rather obviously have to be credited with failing to realize "[i]t would only be necessary [for a prosecution oriented State like Ohio] to redefine the elements that constitute different crimes" in order to avoid the requirements of *Winship*. Yet, this is precisely what Ohio has done.

For example, by eliminating "malice" from its homicide offense, as was done in R.C. of Ohio § 2903.01 *et. al.*, the effect was to substantially lessen the State's burden of proof in all such cases where self-defense is claimed. This follows because obviously when malice is an element of a

murder offense an honest but *mistaken* belief that it was necessary to use deadly force to defend one's self (from imminent peril to life or from great bodily harm) would negate the element of malice and at least reduce the offense involved to manslaughter. With malice eliminated, the offense in such circumstances would be murder.

In any event, the upshot of the combined effect of *Mullaney* and *Patterson*, both *supra*, is that while a State can undeniably require an accused to prove facts that would *mitigate* the gravity of the charged offense; *a State simply cannot require accused persons to prove themselves not guilty.* Yet, such is the unavoidable impact of an instruction that says an accused is innocent if she proves she acted in self-defense. This point gains further momentum when one fully realizes that under the self-defense charge given the jury in *Martin* and assailed herein, *if* the evidence had been, or was, in *equipoise* on the issue of self-defense, a conviction was still required. (See J.A. at 21.)

Admittedly, the criteria that distinguish this Court's holding in *Mullaney* from the holding in *Patterson* are somewhat elusive. Indeed, one of the leading scholars of this area has cogently argued that the only satisfactory reading of *Patterson* is that it overruled *Mullaney.* Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Michigan L. Rev. 30, 36-40 (1977). The Court has not yet embraced that conclusion, however; and even if it did, as Professor Allen demonstrates the question would remain as to the meaning of *In re Winship* (. . . "we are now in the rather interesting position of having two Supreme Court decisions written within two years of one another on functionally identical statutes, one striking down and the other upholding the statutory scheme.

Needless to say, this creates some uncertainty as to what 'the law' is in this area." Id. at 36). Notwithstanding this ambiguity, every theory suggested by members of this Court or by scholars results in the conclusion that the state of Ohio has violated Petitioner's rights by requiring her to prove she acted in self-defense. We will treat these arguments in order.

ELEMENTS OF THE OFFENSE: One theory that may explain *Mullaney* and *Patterson* is that the state of Ohio mu t prove beyond reasonable doubt whatever it labels an element. As we have demonstrated, proof of self-defense negates elements of the offense of murder. Thus, requiring a defendant to prove self-defense has the effect of requiring her to disprove elements of the offense. That is clearly unconstitutional under any interpretation of the relevant line of cases.

It is also important to point out that any argument by the state of Ohio that self-defense does not negate elements, and thus that it is permissible to burden Petitioner with the proof of self-defense, must be of no avail for two reasons. First, such an argument is factually wrong for all the reasons discussed herein and in the brief of *Amicus Curiae* filed in this case. Second, even if this Court concludes that the state of Ohio has not included the absence of self-defense within its definition of homicide or that proof of self-defense negates elements of the offense, that only begins rather than ends the analysis. To say that if a fact is an element requires that it be proven beyond reasonable doubt is most definitely not to say that if a fact is not an element it need not be proven beyond reasonable doubt. Commenting on this point, Professor Allen has pointed out that "If the state may make any issue an affirmative defense, all that would be left of *Winship* . . . would be lessons in drafting. The only question remaining

would be whether the state had or had not labelled a certain fact as an element, and a constitutional common law would develop to provide resolutions of that issue. To be sure, this alternative would make sense of *Winship*, but it would do so by robbing it of any significance." Allen and DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. L. Rev. 1, 5-6 (1982). Indeed, in *Patterson* this Court noted that there are limits beyond which a state cannot go in the construction of affirmative defenses. 432 U.S. at 210. Thus, the analysis must proceed to other matters to determine if the state of Ohio can constitutionally make self-defense an affirmative defense if this Court concludes that it has attempted to do so.

THE TRADITIONS AND CONSCIENCE OF THE PEOPLE: The Court in *Patterson* suggested that a state statute would be unconstitutional if it "offends some principle of justice so deeply rooted in the traditions and conscience of our people as to be ranked as fundamental." 432 U.S. at 201-02 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958)). As we have demonstrated in this brief, and as has been further demonstrated by the *Amicus* brief in this case, the right to act in self-defense is universally accepted in this country today. A person who acts in self-defense is not excused from the consequences of an otherwise illegal act. Rather, such a person has done no wrong in the universally held view in this country and is an innocent. The state of Ohio, however, argues that it can make a person establish his own innocence by proving self-defense by a preponderance of the evidence. If that is so, then presumably the state of Ohio could also remove the "defense" of self-defense from the statute books entirely, and punish someone who acted in self-defense as

a murderer. This, we submit, would be incontrovertibly inconsistent with the traditions and conscience of the people of this country. Moreover, since self-defense cannot be eliminated from the definition of criminality, a defendant cannot be made to bear the large risk of error that is entailed when he must bear the burden of proving self-defense by a preponderance of the evidence. Just as eliminating self-defense entirely would violate the universal norms of this country, so too, we submit, would punishing a person as a murderer when it is just as likely as not that the person acted in legitimate self-defense. Accordingly, under this test, too, the Ohio statute is unconstitutional.

THE TEST OF HISTORY: Justice Powell has argued that a state cannot shift the burden of proof to a defendant on an issue that makes, and has historically made, a significant difference in punishment and stigma. *Patterson*, 432 U.S. at 216-32 (Powell, J., dissenting). Again, as we have demonstrated, self-defense is an ancient and still universally accepted defense to a charge of murder. Moreover, its establishment results in a finding of innocence that carries no stigma or punishment. This test for the unconstitutionality of the Ohio statute is thus met as well.

SPECIAL STIGMA AND PUNISHMENT: In the recent case of *McMillan* v. *Pennsylvania*, ___ U.S. ___ (1986), Justice Stevens argued that if "a state provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*." Id. at ___. Justice Stevens was distinguishing between provisions of statutes that mitigate and those that aggravate criminality, but his point applies to this Ohio statute as well. Ohio has chosen to distinguish

those who act in self-defense from those who do not (as indeed we assert the state is constitutionally required to do). Thus, under the Ohio statutes, those who act in self-defense are innocent, whereas those who do not are guilty. The only distinguishing trait is the presence or absence of self-defense. Accordingly, a special stigma, and a very harsh punishment, is provided for those individuals for whom the "component" of self-defense is not present. Regardless of the precise form of the statutes, the absence of self-defense clearly gives rise "to a special stigma and to a special punishment." On this ground, then, the state of Ohio should be required to prove the absence of self-defense beyond reasonable doubt.

PROPORTIONALITY IN PUNISHMENT: As Professor Allen has stated, and indeed why this case is presently before this Court, "the fundamental constitutional concern with protecting the defendant's liberty interest articulated in *Winship* can be fully satisfied only if the procedural safeguard of the reasonable doubt standard is linked to a substantive standard guaranteeing that the state's definition of criminal conduct is fair and does not carry the potential for disproportionate punishment." Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harvard L. Rev. 321, 343 (1980). After careful consideration of the various substantive standards that have been suggested, id. at 343-45, Professor Allen demonstrated that the most cogent explanation for the scope of the reasonable standard is that the state must prove beyond reasonable doubt each fact necessary to make the punishment and stigma imposed proportional to the offense under the eighth amendment. This argument was first constructed in Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An*

Examination of the Limits of Legitimate Intervention, 55 Texas L. Rev. 269 (1977), which this Court cited with apparent approval in *Patterson*. The position was developed further in Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Michigan L. Rev. 30, 46-48 (1977):

> This requirement of proportionality . . . provides the means of delineating the extent of the federal interest in that reasonable doubt standard. If the courts conclude that a given punishment is not disproportional to what the state has proved beyond reasonable doubt notwithstanding the presence or absence of any mitigating factors, then a defendant's liberty interest would obviously be satisfied by a statute that required proof of only those elements and that imposed that particular punishment. Accordingly, the mere addition to that statute of an affirmative defense, which after all could constitutionally be ignored, should be equally satisfactory. The import of the proportionality principle is, then, that the state should be required to prove enough to justify the imposition of the maximum sentence permissible under the statute. Once that is accomplished, the accused has been fully protected against an unwarranted deprivation of liberty, and the state should be permitted to elaborate on the basic statute as it sees fit.
>
> The thesis that due process requires proof beyond a reasonable doubt only with respect to those elements of the offense that are "essential" by virtue of the eighth amendment concretely expresses the role of the reasonable doubt standard. It thus clarifies the dimensions of the Constitution's solicitude for the "transcendent value" of liberty—the ambiguous phrase often invoked in constitutional burden-of-proof adjudication as though it explained the result. Together, due process and the eighth amendment

protect criminal defendants from unwarranted deprivations of liberty by requiring the state to establish sufficient factual elements to justify the allotted punishment and by requiring the state, in establishing those elements, to minimize the risk of error adverse to the defendant. Once the overriding constitutional command is satisfied, however, the need for the protective procedure is likewise satisfied, and the traditional state power should be able to reassert itself, permitting the states to allocate burdens of proof as they desire.

In addition to failing to provide cognizable constitutional standards, the unadorned rhetoric of "transcendent values" provides little assurance that the results reached in cases invoking it are constitutionally required. One of the compelling attributes of the proportionality theory is that it cures this deficiency by tying the federal constitutional mandate to a relatively unambiguous constitutional command that has the further advantage of leaving the states substantially free to fashion their own policies. Moreover, it does so in such a way as to reconcile *Winship* and *Patterson* while concomitantly demonstrating the efforts of *Mullaney*. *Winship*, it is now clear, merely articulated what a state must do if a factor is a necessary element of the offense as defined by law. *Patterson*, by contrast, provides the method to determine whether a state's definition of a crime is constitutionally permissible. *Mullaney* erred in failing to inquire whether there are limits to the federal concern in the accused's liberty and reputational interests and whether the markedly different setting of *Mullaney*, as compared to *Winship*, was of any constitutional significance. *Patterson* rectified these errors, if it is viewed as embracing the proportionality concept, by making clear that although the interests articulated in *Winship* are of great importance, standing alone they are inadequate to prohibit a state's allocation of the burden of proof that otherwise is constitutional. *Patterson* makes clear, in other

> words, to what extent the factors present in *Winship* but absent in *Mullaney* are relevant to due process adjudication in this area and to what extent the accused's liberty and reputational interests are independently significant.

See also *Moran* v. *Ohio*, ___ U.S. ___, 105 S.Ct. 350, 354: "Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose 'crime,' for example, consisted in an immediate response to a murderous attack upon him." (Brennan, J., dissenting from denial of certiorari).

Application of the test of proportionality to the facts of this case is quite simple, of course. If the Petitioner acted in self-defense, any punishment would be unconstitutional, let alone the punishment actually imposed. Accordingly, under this test for the scope of *Winship*, the Ohio statute is unconstitutional.

In sum, then, each test for the scope of the constitutional interest in the reasonable doubt standard that has ever been articulated by the Court or the scholars results in the same conclusion: the Ohio statutes placing the burden of proving self-defense on the defendant are unconstitutional. Thus, unless this Court overrules *Winship* or drains it of all serious meaning, the Court must conclude that Petitioner's rights have been abridged.

Essentially the arguments relied on by the State will surely distill into assertions that the misinterpretations given by the majorities on the Courts below should be deemed conclusive on the issue. This will be said to be so because such is only consistent with a State Court's interpretation of its own statutes, which is one of its prerogatives. It is our view that this argument will surely fail to pass muster for the very obvious reason that *Patterson*

not being a self-defense case, really has to be tortured to accomodate the State's arguments.

On the other hand, any recommendation that this Court even attempt such a feat would only be made by those who remain oblivious to certain rather precise language in the *Patterson* opinion itself. For it was here that this Court stated, in clear and unambiguous language, that:

> [I]t is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause *unless* "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Id., 432 U.S., at 201-202 (citing *Speiser* v. *Randall*, 357 U.S. 513, 523 [1958]). (Emphasis supplied.) And, the Court indicated further that:

> This view may seem to permit state legislatures to allocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.

432 U.S. at 210.

Since the *Patterson* decision did not define what those limits were, the decision can only be construed as holding that there is no due process violation in convicting a defendant of murder who just as likely (or not) was acting under extreme emotional disturbance. The reason being extreme emotional disturbance was not an element of the crime of murder. This, of course, is obviously quite different from the situation that arises when it is just as

likely that the accused acted in self-defense as it is that he (or she) acted with murderous intent.

Obviously then placing the burden on our petitioner to prove she acted in self-defense had the effect of "unhinging" the procedural presumption of innocence by, in effect, presuming guilt unless she proved such was not the case. Still another effect of this burden being placed on the accused is that it also undermines the privilege against self incrimination because, as noted in *Patterson*, at n. 13, it virtually forces the accused to testify.

Further support for our thesis is provided by *Holloway* v. *McElroy*, 632 F.2d 605 (5th Cir. 1980), which contains as good an analysis of the *Winship-Mullaney-Patterson* trilogy as can be found anywhere. In that case the Fifth Circuit reckoned with a Georgia statute that put the burden on the defendant to prove the homicide involved therein was committed in self-defense. The Court found the statute to be unconstitutional. In doing so the Court held, despite a State's characterization of the self-defense issue as one involving an affirmative defense, that a State may not place the burden of persuasion on that issue upon the defendant if the truth of such "defense" would negate an essential element of the crime charged. Significantly, the *Holloway* Court has cogently reasoned that the *Mullaney* decision survived the *Patterson* decision regarding this precise holding. *Holloway*, at 626 and n. 33.

In short, it is here being submitted that the test to employ in these situations entails a "functional analysis". Thus, the mere labeling of an issue by a State legislature as an element of a crime, or as an affirmative defense, is insufficient. *Id.*, at page 628. Also, according to *Holloway*, a Court must be satisfied that a State's charac-

terization of its laws does not, by refusing to address *logical inconsistencies*, functionally operate to place the burden of persuasion on an essential element upon the defendant.

What is so significant about *Holloway* is that even though self-defense was labeled an "affirmative" defense under Georgia law, it was still considered an element of the offense because murder is an unlawful killing. And, inasmuch as a killing in self-defense is not unlawful the State was required to prove beyond a reasonable doubt that the killing was not in self-defense. This followed because a finding of self-defense would negate the element of unlawfulness.

Thus petitioner submits that the analysis of the trilogy of cases referred to in the *Holloway* case, by the Fifth Circuit, is not only compelling, well reasoned and convincing; it is thorough and logically persuasive. The upshot of the analysis being referred to is that even though Ohio has seen fit to label self-defense as an affirmative defense, it is, in fact, logically inconsistent with the truth of essential elements of the intentional homicide offenses involved in cases of this ilk.

Indeed in Ohio, and elsewhere in this country, one surely has the absolute right to defend themselves. This right is expressly guaranteed by the Ohio Constitution, in the First and Fourth Sections of its Bill of Rights. Even this is not all. Our own Court of Appeals (in still another Opinion by Judge Jackson, who also dissented below) specifically noted:

> The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, liberty or property without due process of law. Obviously, the State may not require and does not intend that an individual

> succumb to his attacker and possibly forfeit his life rather than act in self-defense.

State v. *Hardy*, 60 Ohio App. 2d 325, 328-329 (1978). Also see *State* v. *Hogan*, 63 Ohio St. 202, 219 (1900).

Thus, we have contended and shown that the right to act in self-defense, which is guaranteed by our constitutions, is invariably a lawful act. Also, "[i]t should be conceded, as an axiomatic proposition, that an indictment or information must to some manner charge the unlawfulness of the defendant's conduct." Anno., 169 *A.L.R.*, 166 (1947). (Art. IV, Sec. 20 of the Ohio Constitution likewise requires what amounts to an allegation of unlawfulness in its indictments. See *Hamilton* v. *Alvis*, 109 Ohio App. 298, 301 [1959].) As argued above, this unassailable tenet emphasizes the extent to which self-defense perforce negates unlawfulness. This being so, the lack of self defense must be regarded as an element of the homicide charge made against Earline Martin in this case.

Apart from the arguments made above, what may be a dispositive point here is really made when one pauses to realize that in *Mullaney* v. *Wilbur*, cited elsewhere, the burden of proof as to the absence of heat of passion was placed on the prosecution even though under Maine law it was specifically regarded as an "affirmative" defense. This very point was emphasized in *Griffin* v. *Martin*, 785 F.2d 1172 (4th Cir. 1986). There the Court treated the dropping of the word "unlawfulness" from the definition of certain offenses as having been done "in the interest of statutory streamlining . . . [and] did not have the purpose of achieving change of the substance," *id.*, 1183.

Also significant here, the Fourth Circuit, in *Griffin* v. *Martin*, recalled for us that "[u]nlawfulness was beyond

any doubt an essential element of murder at common law." *Id.*, at 1183, citing *Chase's Blackstone's Contemporaries*, 4th ed., 1914, pp. 941-942. (". . . The unlawfulness arises from the killing without warrant or excuse. . . .")

On this very point, we fully recognize that in *White* v. *Arn*, 788 F.2d 338, 347 (6th Cir. 1986), our Circuit Court in addressing the contention that *unlawfulness* is necessarily an element of any criminal offense in Ohio, took a contrary position. In rejecting this contention the Sixth Circuit adopted certain language from *State* v. *Morris*, 8 Ohio App. 3d 12 (1982), as the basis for doing so. Here we refer to the following segment of *Morris:*

> When the accused asserts an affirmative defense as a justification for an *otherwise unlawful act*, the burden of proving that justification can be constitutionally assigned to the accused. . . . A contrary ruling would mean that the State is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be lawful.

8 Ohio App. 3d, at 18-19. (Emphasis supplied.)

While the Court, in *White* v. *Arn*, found the above quoted language compellingly "persuasive" (788 F.2d, at 347), upon inspection it is easily shown to be a product of a fallacious or counterfeit reasoning pattern. This is so because *it simply does not follow* that if an accused did not have the burden of proving he (or she) acted in self-defense such "would mean the State is constitutionally required to disprove *every* affirmative defense." (*Id.*, at 347, citing *Morris*.) (Emphasis supplied.) So postured this patent flaw in that Court's ratiocinations unavoidably exposes the conclusion reached from the reasoning pattern relied on in both *White* and *Morris* as being a *non sequiter*. Or, a purist could very well say, the apparent flaw

involved in their rationale is more aptly labelled "the fallacy of the undistributed middle." This would be so because the conclusory statement—*i.e.*, "every defense is a justification for the conduct involved" (*Morris*, at 18-19) is invalid because it simply was *not* distributed in its essential premises. See Hairston, *A Contemporary Rhetoric*, 2d ed. (Houghton Mifflin Co., Boston 1974), p. 266-267.

Obviously then, based on the above arguments, it was unconstitutional to put the burden on Earline Martin because this required her to negate a fact, or facts, essential to the proof of the crime charged.

When the above arguments are coupled with our overall assailment of the positions the Courts below have taken on the self-defense issues are fully considered, the points made by Justices Frankfurter and Black dissenting in *Leland* v. *Oregon*, 343 U.S. 790 (1952), should really become most compelling. Here it was stated:

> [F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the eyes of the jury. It is the duty of the government to establish his guilt beyond a reasonable doubt. This notion, basic in our law and rightly one of the boasts of a free society is a requirement and a safeguard of due process of law in the historic procedural content of "due process" . . . But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death *there must be culpability to turn homicide into murder.*

* * *

> The duty of the State of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt, is the decisive difference between criminal culpability and civil liability. To suggest that the legal oddity by which Oregon imposes upon the accused the burden of proving beyond a reasonable doubt that he had not the mind capable of committing murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.

Id., 343 U.S., at 802, 805.

If nothing else, all this makes the conclusion that unlawfulness is not an element of any homicide offense the product of very flawed reasoning patterns of the type this Court will surely reject. For in addition to the most obvious reasons why this is so, the rationale submitted makes even less sense when the extent to which we have to alter our understanding of basic concepts is considered.

In short, upon analysis of *White* v. *Arn* and *State* v. *Morris*, both supra, what we are really being told is the reason "unlawfulness" is not an element of any homicide offense automatically results from the fact that the Courts in Ohio having opted to place the burden of proving self-defense on the accused mandates that to the extent "unlawfulness" and self-defense coincide, unlawfulness is simply not to be regarded as an element. See Allen & DeGrazia, *The Constitutional Requirement Of Proof Beyond A Reasonable Doubt: A Comment Upon Incipient Chaos In Lower Courts*, 20 Am. Crim. L. Rev. 1, 18 (1982).

If this makes sense, it can only be because the Constitution furnished no bar to the discretion a State has to label a factual issue an affirmative defense or an element of an

offense. This follows because forcing a defendant to bear the burden of proof on the issue of self-defense is really the same, both, conceptually and functionally, as requiring the prosecution to prove the lack of self-defense. It is this irrepressible fact that makes the central issues here so vitally important. For as we see it the danger to the *Winship* doctrine could not be more serious.

CONCLUSION

Apart from all the valid and insuperable, arguments made above, the act of self-defense itself is constitutionally guaranteed as one of our inalienable rights. Indeed, as was once written by a sage of a bygone, though enlightened era, when broadly discussing this issue:

> ". . . the law cannot prevent [self defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat."

O.W. Holmes, Jr., *The Common Law*, 47 (1881).

It has also been demonstrated that the upshot of the *Martin* opinions, in both the Ohio Supreme Court and the Court of Appeals, is that the "mitigation" defense put forth in *Patterson* v. *New York*, 432 U.S. 197 (1977), which stands at the fulcrum of all of the critical positions taken in these opinions, is not properly analogized to this right of self-defense. For it is here that the State's reasoning really breaks down. This follows because the gratuitous mitigation defense raised in *Patterson* bore no relationship to guilt or innocence of the criminal act. Whereas, the claim of self-defense can hardly be viewed as a matter of legislative grace—the situation in *Patterson*.

Postured then by all of the arguments made above, the one fact that seems most incontrovertible is that, not unlike the other States in this Union, Ohio lacks the power to criminalize acts done in self-defense. This being so, it really should suffice here simply to say that any attempt to criminalize acts done in self-defense would be contrary to the:

> . . . Universal judgment that there is no social interest in preserving the lives of aggressors at the costs

> of those of their victims. Given the choice that must be made, the only defensible policy is one that will operate as a sanction against unlawful aggression.

Weschler and Michael, *A Rationale Of The Law Of Homicide I*, 37 Columbia Law Review, 701, 736 (1937).

Hopefully, then, the court will agree it is certainly one thing to tell a jury that if the accused committed certain acts her crime would be murder, *but* that they had the power to reduce the crime to manslaughter *if* the accused proved certain facts to mitigate the seriousness of her criminal act. And, it is another thing to tell the jury that to avoid a conviction for murder the accused has to *prove* her acts were not criminal and that she was justified in acting as she did.

Under the instructions given in this case, despite the due process requirements of *In Re Winship*, 397 U.S. 358 (1970) and *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), Earline Martin was required to disprove the *criminal* intent element of the aggravated murder charge. And, she was required to contend with other instructions that were inconsistent and conflicting. When these insuperable flaws are augmented by other errors and the prosecutor's egregious arguments to the jury, the conclusion that Earline Martin's conviction should be reversed is really not debatable since it cannot be avoided.

As a final point, we hasten to add that in *Patterson* we were told there were limits beyond which a State may not go in defining its crimes and in the allocation of burdens of proof with reference thereto. And, while we were not told just what those limits were, a point recently emphasized in *McMillian* v. *Pennsylvania*, ___ U.S. ___ (1986), it is fair inference from what was said that a State could not, in any event, offend any principle of justice that had come to be regarded as fundamental.

Since the right of self-defense must surely be regarded as fundamental, the obvious conclusion is really hard to resist. But, if it were that simple we really would not be here. On the other hand, regardless of the hidden complexities, if any exist, one thing above all seems certain and beyond dispute. The convoluted and circuitious reasoning patterns relied on by the Ohio Courts in rejecting our various arguments are flawed almost beyond belief.

In making this latter assessment of the Opinions referred to, we borrow for emphasis a metaphor used by the majority in *McMillian* to make a significant point. Simply put, if the notions expressed by Ohio's reviewing Courts (in this cause and in others, *i.e.*, their resolution of these self-defense issues is sanctioned by *Patterson*) were valid, then truly this would be one situation in which the "tail . . . wags the dog of the substantive offense." *McMillian*, at ____.

For all of these reasons the conviction of Earline Martin must be reversed.

Respectfully submitted,

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ADDENDUM

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION—AMENDMENT XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SELECTED SEGMENTS OF THE CONSTITUTION OF THE STATE OF OHIO:

Article I, Section I: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and . . . obtaining safety."

Article I, Section IV: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

Article IV, section XX: The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

REVISED CODE OF OHIO § 2901.5—BURDEN AND DEGREE OF PROOF

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of

proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

* * *

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

REVISED CODE OF OHIO § 2901.21—REQUIREMENTS FOR CRIMINAL LIABILITY

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

* * *

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

REVISED CODE OF OHIO § 2903.01—AGGRAVATED MURDER

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

REVISED CODE OF OHIO § 2903.02—MURDER

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

REVISED CODE OF OHIO § 2903.03—VOLUNTARY MANSLAUGHTER

(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

REVISED CODE OF OHIO§ 2929.71—ADDITIONAL THREE YEARS OF ACTUAL INCARCERATION FOR OFFENSES INVOLVING A FIREARM:

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pur-

suant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony.

Supreme Court, U.S.
FILED
SEP 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6461

In the Supreme Court of the United States

October Term, 1985

EARLINE MARTIN,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Ohio legislature can constitutionally place the burden of proof upon the accused in a murder case to establish the affirmative defense of self-defense by a preponderance of the evidence, where the absence of self-defense is not an element of the crime charged.

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF ON THE MERITS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are set out in the Appendix to this Brief at pp. A1-A6. Those being referred to are:

(1) United States Constitution—Amendment XIV.

(2) Constitution of the State of Ohio—Article I, Section 1.

(3) Revised Code of Ohio, §2903.01.

(4) Revised Code of Ohio, §2903.02

(5) Revised Code of Ohio, §2903.03.

(6) Revised Code of Ohio, §2901.05.

(7) Revised Code of Ohio, §2901.21 (A) & (C).

(8) Revised Code of Ohio, §2901.22.

STATEMENT OF THE CASE

Petitioner, Earline Martin, was indicted, tried and convicted of the crime of Aggravated murder, Ohio Revised Code §2903.01, with firearm specification. Petitioner's appeals to the Court of Appeals, Eighth Judicial District, and the Ohio Supreme Court, resulted in her conviction being affirmed.

STATEMENT OF THE FACTS

The State's evidence consisted of the testimony of fifteen witnesses which proved beyond a reasonable doubt that the petitioner, Earline Martin, was guilty of aggravated murder. The victim was Walter Martin, a seventy-three year old retired police officer and the petitioner's sixth and last husband. It was Mr. Martin's second marriage. During the duration of their marriage, in May of 1983, Mr. Martin was hospitalized for a heart attack and stroke (R. 437).

The testimony of several State witnesses established that this short-lived marriage was not harmonious. Delores Williams, Walter Martin's eldest daughter, testified that on July 18, 1983, she called petitioner to inform her Mr. Martin had temporarily moved into her Warrensville Heights apartment (R. 232). Earline Martin's reaction to the separation was as follows: *"Your father is not going to leave me again. I took my marriage vows seriously. I said. 'To death do us part' and that's what I meant"* (R. 232).

Narleen Brown, the granddaughter of Walter Martin, testified to a conversation with Earline Martin on the same day. Regarding Mr. Martin leaving her, petitioner specifi-

cally stated: "I'm going to tell you one thing, Nickie, bad luck will follow your daddy (grandfather) for the rest of his life," and hung up the phone (R. 289).

Gloria Oliver, the second daughter of Walter Martin, testified to a conversation with petitioner after the couple's first separation. Petitioner *confided in her, admitting that "Before I let your father make a fool of me again, I'll blow him away, Gloria Jean"* (R. 315). Gloria Oliver also called the petitioner's home on the morning of July 21, 1983, shortly after the victim's murder. In answer to her question as to what was wrong, the petitioner said: "Gloria Jean, I'm tired of fighting with your father" (R. 318).

The State further offered the testimony of Mr. Anthony LaPerna, Walter Martin's attorney. Mr. LaPerna substantiated that Walter Martin had twice sought to petition for divorce during his brief marriage to petitioner. This dated back to December 1982, and again on July 19, 1983 (R. 342, 344).

The State submits that it was as a direct result of this unhappy marriage and the fact that the victim wanted a divorce, further established by the threats of petitioner, that ultimately led to the murder of decedent by petitioner.

The events of July 21, 1983:

According to the written statement of petitioner, in the early morning hours of July 21, 1983, she went upstairs, got a gun, and went into the kitchen where Walter Martin was sitting. Walter Martin was coming towards her, and she shot him, causing his death (R. 361-362). The petitioner claimed she shot him in self-defense. The jury, after being presented with the physical evidence of this case, rejected this claim of self-defense and found petitioner guilty of Aggravated murder.

Sadie Martin, the roommate of Delores Williams, testified that prior to the killing, at approximately 9:00 in the morning, Walter Martin called his daughter. She spoke to Mr. Martin several minutes before informing Delores her father was on the line. Sadie Martin came back to the phone to tell him Delores would return his call. She heard petitioner over the phone yell, "Dirty—" and five or six subsequent gunshots in rapid succession. The phone dropped at the other end of the line (R. 1720).

The Emergency Medical Services were the first to arrive at the murder scene (R. 87). The petitioner testified that she first called her attorney, who advised her to call the police (R. 445). Mr. Roman Black of the Cleveland Emergency Medical Service testified to receiving the broadcast at 9:44 a.m., and arriving at the scene ten minutes later (R. 86). A woman let him in, whereupon he found a male lying on the kitchen floor (R. 87-88). The woman, dressed in a robe with curlers in her hair, appeared calm (R. 96). As to the condition of the body, there was a large amount of coagulated blood nearby (R. 90), and the victim was dead (R. 89, 109).

The police arrived at the scene at approximately 9:50 a.m. (R. 112). Terry Hageman, a patrolman for the City of Cleveland, testified that he and his partner were told by petitioner that she had shot her husband (R. 114). She told them where to find the gun used to kill the victim (R. 122, 123). Upon checking the gun, it appeared to have spent bullets (R. 124). They observed the body lying on the floor, next to a phone jack on the floor board (R. 114-116). There was a telephone on the wall above the jack (R. 117).

Detective Pollutro of the Cleveland Police Department Scientific Investigation Unit testified to receiving the fire-

arm from Detective Taliaferro (R. 145). The weapon was tested for trigger pull (R. 147). Detective Pollutro was asked to determine whether the morgue pellets, removed from the decedent, were fired from this particular gun. The comparison test established that this gun could have fired the bullets causing the victim's death (R. 150-151).

The State presented two witnesses from the Cuyahoga County Coroner's Office. Dr. Robert Challener, an expert in forensic, anatomical and clinical pathology, gave the following testimony (R. 37). His observations showed the victim received three gunshot wounds. He concluded the gunshot wound entering the trunk area would have been fatal even if it was the only shot fired (R. 47-48). He also opined that the gun shot wound to the chest had been fired from a distance of two feet or beyond (R. 39-42). No drugs or alcohol were found in the victim's body (R. 51-52).

Sharon Rosenberg, a trace evidence technician for the Cuyahoga County Coroner's Office, testified to the results of trace metal detection and gunshot residue tests performed on the decedent's body and clothing (R. 67-70). She testified there was no evidence of metal on the victim's hands to indicate that he recently had contact with a metal object such as a gun (R. 72). The probable distance from which the murder weapon was fired was beyond two to three feet (R. 74-75). Her testimony corroborated that of Dr. Challener's testimony.

The petitioner was the sole witness for the defense. According to her testimony, in the early hours of July 21, 1983, she and the victim fought over grocery money (R. 441). She claims that the victim hit her (R. 441). Later, she went upstairs, washed and rolled her hair, and put on a duster (R. 441-442). Petitioner then went into the bedroom and got a gun (R. 442). She intended to

hide it in the kitchen where the victim was sitting (R. 442-443). Before she could do so, the victim questioned her as to what she had in her hands (R. 443). She then shot him (R. 443), six times.

Defense counsel sought to establish a defense of self-defense. Defense counsel elicited from petitioner a prior incident concerning an alleged pistol-whipping petitioner allegedly received from the victim some three months before the killing (R. 432).

The defense counsel requested jury instructions on self-defense and the trial court complied (R. 699-704).

SUMMARY OF THE ARGUMENTS

Ohio's affirmative defense of self-defense does not violate due process as construed by this Court in *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977); and *McMillan v. Pennsylvania*, ... U.S. ..... (1986). Affirmative defenses, in general, are not prohibited by the Constitution. Ohio's affirmative defense of self-defense is not violative of due process where the affirmative defense constitutes a separate issue and does not serve to negate any facts of the crime which the State of Ohio has the burden of proving beyond a reasonable doubt.

Indeed, *Patterson* has expressly held that the Due Process Clause does not require a State, in a criminal trial, to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses relating to the culpability of an accused. We would ask this Court to apply the principles set forth in *Patterson* to the Ohio law on self-defense. Specifically, *Patterson* recognizes that States are given great latitude to regulate their criminal

procedures, define elements of crimes, and allocate the burden of persuasion as they see fit unless the procedures offend due process. We submit that Ohio's law on self-defense and its placing the burden of persuasion for that defense on the accused does not violate due process.

In Ohio, the burden of proof in all prosecutions is, at all times, on the State to prove the elements of the crime charged beyond a reasonable doubt. For example, in the present case, the jury was instructed:

> The plea of not guilty as so tendered by the defendant, has, as a matter of law, the effect of placing upon the shoulders of the State of Ohio the burden of proving beyond a reasonable doubt the existence of each and every material allegation and averment of the indictment. (Joint Appendix at 6).

Similarly, the Ohio statute satisfies the *Winship* rule that the reasonable doubt standard applies to every fact necessary to constitute the crime with which the defendant is charged, and that an accused is presumed innocent. The trial court explained to the jury the instructions with respect to the presumption of innocence as follows:

> The plea of not guilty entered by the defendant, as a matter of law, has a further effect; such plea clothes the defendant with the *legal presumption of innocence. This presumption of innocence is not a mere matter of form, but* [677] *rather is a shield which the law throws about the defendant.*
>
> This presumption of innocence is afforded the defendant as he enters upon the trial and remains with the defendant throughout the entire trial and during the examination into every fact and proposition to be proven by evidence by the State. This presumption

of innocence is only overcome or overthrown when you, as a jury, find the proof is such as to exclude every reasonable doubt of the guilt of the defendant.

Ohio Revised Code Section 2901.05, effective January 1st, 1974 provides:

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt and the burden of proof is upon the prosecution. (Emphasis added, Joint Appendix, at 6, 7).

We would urge this Court to reaffirm the principles established in *Leland v. Oregon*, 343 U.S. 790 (1952), and *Rivera v. Delaware*, 429 U.S. 877 (1976) upholding statutory placement for the burden of proving insanity upon the accused. *Leland* rejected a constitutional challenge against an Oregon statute which required the defendant to proved insanity beyond a reasonable doubt. More recently, *Rivera* upheld a Delaware statute which required the defendant to prove that defense by a preponderance of the evidence. The Ohio self-defense law places less of a burden upon a defendant than does the defense of insanity, since self-defense justifies the crime charged, and does not require the use of expert testimony. The Ohio self-defense law satisfies due process requirements more clearly than those statutes found constitutional in *Leland* and *Rivera*.

We urge this Court to uphold Ohio's affirmative defense law of self-defense as not being in violation of due process standards.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED WHERE THE OHIO LEGISLATURE PLACES THE BURDEN OF PROOF UPON A DEFENDANT TO ESTABLISH THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

The Petitioner's initial contention is one with which the Respondent wholeheartedly agrees, that is, the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). This fundamental concept is firmly rooted in our jurisprudence, and contrary to the Petitioner's arguments Ohio law on self-defense preserves this concept inviolate.

The Petitioner's argument is essentially that Ohio's law on self-defense is unconstitutional in placing the burden of proof on an accused since by asserting self-defense, an accused necessarily negates the "elements" of criminal intent and unlawfulness. Therefore, Petitioner argues, an accused must prove his innocence by disproving these elements of the crime.

The Petitioner's arguments are a product of a failure to understand the nature of self-defense in Ohio and a failure to acknowledge controlling case law, both of which conclusively establish that these arguments are groundless and accordingly should be rejected by this Honorable Court.

A. Ohio's Law on the Affirmative Defense of Self-Defense Does Not Violate Due Process Where the Affirmative Defense Constitutes a Separate Issue and Does Not Serve to Negate Any Facts of the Crime Which the State Has the Burden of Proving Beyond a Reasonable Doubt in Order to Convict.

Ohio Revised Code Section 2901.05(A) provides:

Ohio Revised Code Section 2901.05 Burden and Degree of Proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense is upon the accused.

Prior to the enactment of Revised Code Section 2901.05, effective November 1, 1978, the Ohio legislature enacted a law that with respect to all affirmative defenses a defendant has only the burden of going forward with evidence of a nature and quality sufficient to raise the defense and does not have the burden of establishing such defenses by a preponderance of the evidence. *See, State v. Robinson*, 47 Ohio St. 2d 103 (1976); and *State v. Humphries*, 51 Ohio St. 2d 95 (1977). This approach was a complete departure from the traditional Ohio rule that self-defense must be proven by the defendant by a preponderance of the evidence. *State v. Robinson, supra* at 110.

In 1978, the Ohio legislature changed the law to conform to the very sound reasons underlying the previous Ohio rule. The change in the law undoubtedly came about

as a result of the legislature's desire to prevent sham claims of such affirmative defenses as self-defense.

Several justifications exist for the traditional common law rule that the defendant bear the burden of proving affirmative defenses. First, affirmative defenses are considered to be a matter separate from the elements of a crime. They are a matter of exception, not negation. Second, a defendant is in a position superior to the prosecution to know and provide evidence concerning the circumstances of the affirmative defense he asserts.

The petitioner was indicted for Aggravated murder as defined in Ohio Revised Code Section 2903.01(A): "No person shall purposely, and with prior calculation and design, cause the death of another." The State of Ohio had the burden of proving beyond a reasonable doubt these three essential elements of the crime, i.e., purposely, prior calculation and design, and caused the death of another.

Ohio Revised Code Section 2901.05(C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence."

Ohio law has determined that self-defense is an affirmative defense in that it is a justification for otherwise illegal conduct. *See, State v. Nolton*, 19 Ohio St. 2d 133 (1969); and *State v. Poole*, 33 Ohio St. 2d 18 (1973).

The Ohio Supreme Court in *State v. Poole*, *supra*, at 19, characterized affirmative defenses as "justification(s) for admitted conduct." The Court continued by stating that an affirmative defense is not a mere denial or contradiction of the prosecution's evidence but is rather a

substantive or independent matter under which an accused claims exemption from liability "even if it is conceded that the facts claimed by the prosecution are true." *Id.* The affirmative defense of self-defense has been characterized as being in the nature of a confession and avoidance, by which an accused admits the existence of facts which "tend to establish the elements of the crime." *State v. Davis,* 8 Ohio App. 3d 205, 209 (1982).

Most recently, in our present case, *State v. Martin,* 21 Ohio St. 3d 91, 94 (1986), the Ohio Supreme Court reemphasized that an accused who seeks to rely on self-defense actually admits that he committed the act but seeks to justify his conduct on an independent basis.

By asserting self-defense, an accused does not necessarily admit the elements of the crime. Rather, an accused admits doing the act and at the same time advances a theory as to why he was justified in doing the act.

The Sixth Circuit Court of Appeals in *Thomas v. Arn,* 704 F.2d 865 (6th Cir., 1983), discussed the nature of Ohio's affirmative defenses. The definition of affirmative defenses set out in Ohio Revised Code Section 2901.05 (C)(2) does not refer to negations of elements of crimes. Instead, the use of the terms "excuse" and "justification" implies that a criminal offense has been committed, that is, that all of the elements of the crime have been proved beyond a reasonable doubt. 704 F.2d at 877. The affirmative defense is a separate issue raised only after the prosecution has established the elements of the crime beyond a reasonable doubt. *Id.* at 878.

Ohio law provides that a defendant must establish the following three facts to prevail on the claim of self-defense: (1) He was not at fault in creating the situation

giving rise to the affray; (2) He had a bona fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape from such danger was in the use of such force; and (3) He did not violate any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St. 2d 74, 79-80 (1979); *State v. Melchior*, 56 Ohio St. 2d 15, 20-21 (1978).

The elements necessary to establish self-defense are such that the burden should naturally fall upon a defendant since the nature of the defense is very subjective. The jury was charged in accordance with Ohio law that they were to put themselves in the place of the defendant to determine whether the defendant had reasonable grounds to believe that she was in imminent danger. Joint Appendix at 20. A defendant is certainly in a far better position that the State to produce evidence as to which his or her beliefs were at the time of the crime. To place this burden upon the State would encourage those criminally charged to raise the self-defense issue fatuously and to challenge the State to disprove it beyond a reasonable doubt.

This is especially made clear in the case *sub judice* in that the Petitioner testified at trial that she feared for her life because the victim struck her prior to the fatal shooting. This, then, was a matter peculiarly within her knowledge upon which it was fair to require her to come forward with evidence to support her claim of self-defense.

The Petitioner's claim that she acted in self-defense does not negate any of the elements upon which the Respondent relied to prove the crime of Aggravated murder. Specifically, as indicated by the statutory language, the crime of Aggravated murder contains three elements which must be proved by the State beyond a reasonable

doubt: (1) purposely; (2) prior calculation and design; and (3) cause the death of another. Ohio Revised Code Section 2903.01.

None of the three above-mentioned elements are negated by the defendant's utilization of the affirmative defense of self-defense. In a remarkably similar case, the Sixth Circuit Court of Appeals in *White v. Arn*, 788 F.2d 338 (6th Cir., 1986), specifically analyzed the elements of Ohio's murder statute, in accordance with this Court's ruling in *Patterson v. New York*, 432 U.S. 197 (1977), and concluded that the elements of purposely and causing the death of another were not negated by a claim of self-defense:

> Having determined the elements of murder as defined by statute, we next turn to the second inquiry in the *Patterson* analysis, whether self-defense negates either of the elements. We conclude that it does not. The defense has been described as being "in the nature of a confession and avoidance, by which a defendant essentially admits the existence of facts which tend to establish the elements of the crime. *Davis*, 8 Ohio App. 3d at 209, 456 N.E.2d 1256. When a defendant asserts the defense of self-defense in a murder trial, the defendant does not dispute or negate the elements of "purposely" or "cause the death of another." Rather, the defendant solely seeks to establish the elements of self-defense, which are unrelated to the elements of murder. *See Isaac v. Engle*, 646 F. 2d 1129, 1139 (6th Cir., 1980) (*en banc*) (Lively J., dissenting), *rev'd*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed. 2d 783 (1982). (The defense of self-defense "admits the facts claimed by the prosecution to establish an offense, but relies on the existence of a separate set

> of facts or circumstances which the law recognizes as an excuse. When established, this excuse exempts the defendant from liability."). The elements which must be shown to establish self-defense are: 1) the slayer was not at fault in creating the situation giving rise to the affray, . . . 2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, . . . and 3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St. 2d 74, 79-80, 388 N.E.2d 755 (1979). Since the defense of self-defense does not negate either of the statutory elements of murder, it appears that Ohio did not violate the Due Process Clause by requiring White, pursuant to Ohio Revised Code Section 2901.05 (A), to prove her defense of self-defense by a preponderance of the evidence.

With respect to the element of prior calculation and design, the jury was instructed in accordance with the following instruction:

> Prior calculation and design means the purpose to kill was reached by the defendant through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan, involving studied consideration of the method and the means with which to kill another, or the instrument or weapon used to kill another.
>
> No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill.
>
> Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient

> to constitute the kind of prior calculation and design required for [691] aggravated murder.
>
> In determining the element of prior calculation and design, if you find that the State has proved beyond a reasonable doubt that the Defendant actually formed a purpose to kill and that her purpose was arrived at with prior calculation and design before she performed the act, that is sufficient for this element of aggravated murder.

(Joint Appendix, at 14); *See also State v. Pierce,* 64 Ohio St. 2d 281 (1980); *State v. Cotton,* 56 Ohio St. 2d 8 (1978).

To require a defendant to establish that he was in imminent danger of death or great bodily harm does not negate the prosecution's burden to prove he acted with prior calculation and design. These separate factual determinations are matters for the jury's consideration. For example, take the situation where the accused receives a telephone call from the victim who indicates that he will arrive to kill the accused. Meanwhile, the accused secures a weapon and takes other measures to protect himself. When the victim arrives, a confrontation occurs and the accused kills the victim claiming self-defense. The accused may well have acted with prior calculation and design or killed in self-defense. Again, these separate factual determinations are matters for the jury consideration.

In the present case, the question whether or not Petitioner acted with prior calculation and design or killed in self-defense was for the jury to resolve. The jury rejected Petitioner's self-defense claim and concluded that the State had proven that Earline Martin acted with prior calculation and design in the murder of her husband.

In addition, Petitioner claims that criminal intent and unlawfulness are elements of the crime of Aggravated murder.

In *White v. Arn, supra,* the court considered and rejected virtually identical claims and arguments on Ohio's self-defense law presented for decision before this Court.

With respect to the Petitioner's argument that criminal intent is an element of the crime of Murder, the federal appellate court addressed the issue by stating:

> White next argues that self-defense negates the element of criminal intent. White asserts that this element, a "blameworthy" or "guilty" state of mind, must be established under Ohio criminal law in order for an act to be criminally punishable. We addressed this same argument and the same asserted case authority in *Thomas.* As we observed in *Thomas,* the "guilty" and "blameworthy" states of mind required to convict an accused are specified in Ohio Revised Code Section 2901.22, which defines the mental elements of purposely, knowingly, recklessly and negligently. *Thomas,* 704 F.2d at 876 n. 14. By these specific definitions, the Ohio Legislature has supplanted the common law notions of *mens rea. Id.* Thus, in each crime in Ohio the requisite criminal intent is expressly provided and is not merely a general element of "blameworthiness." The criminal intent element of murder is "purposely," and, as we stated previously, proving self-defense does not negate this element. *See id.* ("Although a person claiming to have acted in self-defense may not literally have a 'guilty' or 'blameworthy' state of mind, he may very well have knowledge of the probable results of his actions, and this mental state is sufficient to convict for aggravated assault."). 788 F.2d at 346.

Petitioner also asserts that unlawfulness is an element of all Ohio crimes. The federal court in *White v. Arn, supra,* also addressed this assertion and concluded that unlawfulness was not an element. The federal court reasoned:

> White lastly argues that unlawfulness is an element of all Ohio crimes and that self-defense negates this element. This argument, and the cases which purportedly support it, has been rejected repeatedly. *See Carter,* 637 F.2d at 456 n. 6; *Thomas,* 704 F.2d at 876-77; *State v. Morris,* 8 Ohio App. 3d 12, 18-19 (1982). The Ohio appellate court in *Morris* explained its decision thusly:
>
> > Once the prosecution has proven each element of felonious assault, the prosecution has proven the unlawfulness of defendant's acts. When the accused asserts an affirmative defense as a justification for an otherwise unlawful act, the burden of proving that justification can be constitutionally assigned to the accused. . . A contrary ruling would mean that the state is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be "lawful."
>
> 8 Ohio App. 3d at 18-19 (citations omitted). We find this reasoning persuasive and conclude that unlawfulness is not an element of murder in Ohio and therefore self-defense does not negate unlawfulness. (*Id.* at 346-47).

The same court addressed White's as well as the Amicus' contentions raised herein that Ohio's murder statutes also contained the elements of criminal conduct, voluntariness and that the Ohio indictments allege acts that

are against the peace and dignity of the State of Ohio. The *White v. Arn* court summarily rejected these contentions by stating:

> White argues that criminal conduct is an element of murder and that the defense of self-defense negates this element since it establishes that the conduct was non-criminal in nature. We rejected the same argument with respect to the crime of aggravated assault in *Thomas v. Arn*, 704 F.2d 865, 875 (6th Cir., 1983). Even though the crime at issue in *Thomas* was aggravated assault, Ohio Revised Code Section 2903.12, that case is completely applicable here. White contends that the five additional elements, including criminal conduct are elements of *all* Ohio crimes. Since we have already decided that criminal conduct is not an element of aggravated assault, we must also conclude that it is not an element of murder. Accordingly, we reject White's argument to the contrary. . .
>
> * * *
>
> White next argues that "voluntariness" is an element of murder which is negated by self-defense. White observes that Ohio Revised Code Section 2901.21 imposes the requirement that an act be voluntary in order to impose criminal liability. White contends that an act of self-defense is more of a reflex action than a voluntary one, citing *State v. Hardy*, 60 Ohio App. 2d 325, 329 (1978), and therefore concludes that self-defense negates the voluntary act element of murder. We rejected the same argument, which was based on the same case authority, in *Thomas*. As we observed in *Thomas*, Ohio defines what constitutes a voluntary act by stating which acts are involuntary. Section 2901.21(C) provides that "[r]eflexes, convulsions,

> body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actors volition, are involuntary acts." In light of these examples of involuntary acts, we conclude, as we did in *Thomas*, that an act in self-defense is not an involuntary act and therefore does not negate the voluntary act requirement. *Thomas*, 704 F.2d at 876.
>
> * * *
>
> White next argues that self-defense negates the Ohio constitutional requirement that all indictments allege that the acts complained of were "against the Peace and Dignity of the State of Ohio." Ohio Constitution art. IV §20. White contends that an act in self-defense is not illegal and therefore cannot be against the "peace and dignity" of the State. White cites no cases which support the proposition that this is an element of every crime which must be established by the prosecution, however, and accordingly we reject this argument as we did in *Thomas*. 704 F.2d at 876 n. 15.

Therefore, after a careful scrutiny, the Court properly concluded that the above-mentioned claimed elements are not, in reality, elements of the crime charged which the State must prove beyond a reasonable doubt.

Other federal and state cases have similarly rejected the identical arguments disposed of in *White v. Arn, supra*. *See, Thomas v. Arn* 704 F.2d 865, 876-77 (6th Cir., 1983); *Carter v. Jago*, 637 F.2d 449, 456 (6th Cir., 1980), *certiorari denied*, 456 U.S. 980 (1982), and *State v. Morris*, 8 Ohio App. 3d 12 (1982).

The rationale employed by the *Morris* court is essentially that once the prosecution has proven each element of the crime, it has proven the unlawfulness of the defendant's acts. An affirmative defense is a justification

for an otherwise unlawful act. The burden of proving this justification can be constitutionally assigned to an accused. "A contrary ruling would mean that the State is constitutionally required to disprove every affirmative defense, since every defense is a justification for the conduct involved which causes that conduct to be 'lawful' ". 8 Ohio App. 3d at 19.

A second and separate panel of the Sixth Circuit in *Wilson v. McMacken,* 786 F.2d 216 (6th Cir., 1986), recognized the viability of *Carter v. Jago, supra* and *State v. Martin, supra,* when it reaffirmed the principle that it does not violate due process to require a defendant to prove self-defense by a preponderance of the evidence. 786 F.2d at 219.

In the case *sub judice,* the Due Process Clause has not been violated since Ohio's scheme does not reallocate or reduce the State's burden to prove each essential element of the crime with which the accused has been charged.

As the Ohio Supreme Court recognized, the State proved beyond a reasonable doubt that the Petitioner purposely and with prior calculation and design caused the death of her husband. *State v. Martin, supra* at 94. Based upon the facts, the jury could have concluded that the Petitioner either acted with or without prior calculation and design; it also could have believed or disbelieved her claim of self-defense.

Thus, placing the burden on the Petitioner that she acted in self-defense in that she was in imminent danger of death or bodily harm did not negate the State's burden of proof that she acted with purpose and prior calculation and design.

B. The Due Process Clause of the Fourteenth Amendment Does Not Require a State, in a Criminal Trial, to Disprove Beyond a Reasonable Doubt Every Fact Constituting Any and All Affirmative Defenses Related to the Culpability of an Accused.

The State of Ohio asserts that this Court's prior decisions do not require the State to disprove the affirmative defense of self-defense. Our discussion begins with the case of *In re Winship*, 397 U.S. 358 (1970).

In that case, this Court considered a New York rule permitting an adjudication of juvenile delinquency on a mere preponderance of the evidence. In finding that rule unconstitutional, this Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364.

The basis of the *Winship* holding is to protect the concept of the presumption of innocence since proof beyond a reasonable doubt was a necessary corollary of the presumption of innocence.

Five years later, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court was confronted with a situation wherein the State of Maine placed the burden of proof on the defendant to disprove an element of the crime. *Mullaney* involved a homicide prosecution in Maine, where the statute recognized murder and manslaughter as the only two types of homicide. The trial judge then instructed the jury that the elements of murder and manslaughter were identical except that murder required a

finding of malice aforethought, an element not required for manslaughter. Thereafter, the jury was instructed that once the prosecution established the common elements of murder and manslaughter, malice was to be presumed unless the defendant was able to prove by a preponderance of the evidence that he acted in the heat of passion upon sudden provocation. Thus, once the defendant was shown to have committed a homicide, he was presumed guilty of murder unless he proved he acted in the heat of passion. In essence, the State did not have to prove malice which was an essential element of the crime of murder. The defendant, in reality was forced to disprove an established element of the murder offense. This violated due process under the *Winship* rationale.

Shortly thereafter, this Court enunciated the current controlling law concerning the issue of the burden of proof with respect to affirmative defenses. This case, of course, was *Patterson v. New York, supra.*

In *Patterson*, this Court considered a New York murder statute similar to the statute in *Mullaney* which dispensed with the prosecution's need to prove malice. The murder offense in New York required as *mens rea* only an intent to kill. Malice was not an element of the crime. Instead, the New York law provided an affirmative defense if the defendant proved he acted while subject to an "extreme emotional disturbance." If successful, the offense would be reduced to manslaughter. The *Patterson* Court concluded that the statutory scheme in New York, rather than negating any elements of murder permitted the defendant to introduce a mitigating factor which reduced his culpability. Thus, the *Winship* rationale had been satisfied in that the prosecution was required to prove

every element necessary to constitute the crime charged against the defendant. *Patterson* is distinguished from *Mullaney* on the basis that the Maine statute in *Mullaney,* by requiring the defendant to prove an alleged defense, created a presumption that dispensed with the prosecution's need to prove an essential element of the crime. The New York statute in *Patterson* involved no presumption. Taken together, *Mullaney* and *Patterson* establish that the prosecution may not shift to the defendant the burden of persuasion on any issue of fact which, if proved, negates an essential element of the offense with which a defendant is charged. *Patterson* limits the *Winship* doctrine to the essential elements of the offense. *Patterson* states that the courts must determine whether a defense actually negates an element of the crime, and if it does, to require the State to disprove the defense.

The Petitioner impliedly recognizes the strength of the *Patterson* decision to support Ohio's position by unsuccessfully attempting to distinguish its only too manifest applicability to the present case.

The persuasive impact of *Patterson's* rationale and its holding as it applies to the instant case cannot be overemphasized as *both* cases involved affirmative defenses which went to a reduction in crime or a complete justification for crime, the burden of proof being on the defendant by a preponderance of the evidence. In *both* cases, the defendant claimed that their defenses negated an element of the prosecution's case.

Contrary to the Petitioner's myopic reading of *Patterson*, the decision does not deal merely with defenses of mitigation which go to the degree of crime as opposed to self-defense which is a justification for crime.

The *Patterson* Court began by recognizing that at common law, the burden of proving affirmative defenses was placed on the defendant. 432 U.S. at 202.

Much of the *Patterson* decision was based upon the Court's two previous decisions dealing with the affirmative defense of insanity, *Leland v. Oregon*, 343 U.S. 790 (1952) and *Rivera v. Delaware*, 429 U.S. 877 (1976).

The Court in *Leland* upheld an Oregon rule which required a defendant to prove his insanity beyond a reasonable doubt. The *Patterson* Court reiterated the *Leland* rationale that the Oregon scheme mandated that the State prove all the elements of the crime beyond a reasonable doubt. *Id.* at 204. The continuing validity of this doctrine was confirmed in *Rivera v. Delaware*, where Delaware's scheme which placed the burden of proof by a preponderance of the evidence on the accused to prove insanity came under attack, once again, and the Court dismissed the appear for not presenting a substantial federal question.

The fact that the issue presently before this Court is self-defense, which serves as a justification for crime, as opposed to mitigation with respect to the degree of crime, is a distinction without a difference.

In giving its imprimatur to New York's law, the *Patterson* Court discussed the pattern established in both Oregon's and New York's laws. Once the facts constituting a crime are established beyond a reasonable doubt, then based on all the evidence, including that going to the defendant's mental state, a state may refuse to sustain an affirmative defense unless the defendant has met his burden. 432 U.S. at 206.

The Court found that the defendant's assertion that he acted under extreme emotional distress "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder." *Id.* at 207. Rather, it is a separate issue upon which a defendant may properly be required to carry a burden.

Contrary to the petitioner's assertion, the *Patterson* Court discussed affirmative defenses that both mitigate or exculpate and concluded that the Due Process Clause does not mandate that New York either abandon these defenses or disprove their existence. 437 U.S. at 207-208.

The Court continued:

> We thus decline to adopt as a constitutional imperative, operative country wide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. . . .
>
> . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. 432 U.S. at 210.

Thus, Ohio asserts that the *Patterson* doctrine does not require the State to disprove the affirmative defense of self-defense.

C. A State Legislature May Regulate Procedures As Well As Define Elements of Crimes Without Violating the Due Process Clause of the Fourteenth Amendment Unless It Offends Some Principle of Justice So Deeply Rooted in the Traditions and Conscience of Our People As to Be Ranked As Fundamental.

It is axiomatic that the states under our federal system have the principal responsibility for defining and prosecuting crimes. *See, Abbate v. United States,* 359 U.S. 187 (1959). Although the Fourteenth Amendment does not change the distribution of powers between the states and the federal government so as to withdraw the basic interest of criminal justice from the exclusive control of the states, it does impose restrictions upon the states in making and enforcing its criminal laws. *See, Knapp v. Schweitzer,* 357 U.S. 371 (1958).

The State of Ohio has not exceeded the constitutional restrictions in enacting a statutory scheme in requiring a defendant to bear the burden of persuasion by a preponderance of the evidence on the affirmative defense of self-defense.

The *Patterson* Court stated that there are constitutional limits beyond which the states may not go and cited as examples that a legislature may not declare an individual guilty or presumptively guilty of a crime. Also, a legislature cannot validly declare that mere proof of the identity of an accused creates a presumption of the existence of facts essential to a finding of guilt. 432 U.S. at 210.

In fact, the *Patterson* decision affords states considerable latitude in the establishment of their criminal procedures. For example:

> If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, *if in its judgment this would be too cumbersome, too expensive, and too inaccurate.* (Emphasis added, at 209).

This principle was recently recognized in *McMillan v. Pennsylvania*, ... U.S. ..... (1986). There the Court recognized that it has never attempted to define what these constitutional limits are, specifically, the extent to which due process forbids the reallocation or reduction of burdens of proof in criminal cases.

The Court in *McMillan* held that the State of Pennsylvania may properly treat visible possession of a firearm as a sentencing consideration rather than as an element of an offense that must be proved beyond a reasonable doubt. In so holding, this Court rejected the Petitioner's claims that the Due Process Clause as interpreted in *Winship* and *Mullaney* mandates that a State prove visible possession of a firearm beyond a reasonable doubt.

This Court found *Patterson* to be controlling. It stated: "*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt, *the State legislature's definition of the elements of the offense is usually dispositive. . .*". (Emphasis added). The Court gave proper deference to the Pennsylvania legislature's decision not to include visible possession of a firearm as an element of the crimes enumerated in the mandatory sentencing statute.

The Court then discussed the constitutional limits placed on a State in defining the elements of its crimes as was first mentioned in *Patterson*. The Court concluded that Pennsylvania's law did not transgress the limits set out in *Patterson*. Specifically, the law did not create a presumption of guilt as in *Mullaney*. Also, it did not relieve the prosecution of its burden of proving guilt.

Similarly, Ohio has not transgressed the limits set out in *Patterson*. Ohio law does not create a presumption of guilt. The jury was instructed that the presumption of innocence remains with the accused unless and until the prosecution meets its burden of proof beyond a reasonable doubt. (Joint Appendix at pp. 6-7). Nor does Ohio law on self-defense relieve the prosecution of its burden of proving each and every element of the offense charged beyond a reasonable doubt. (Joint Appendix at p. 6).

The *McMillan* Court also rejected the Petitioner's reliance on the fact that many legislatures have made possession of a weapon an element of various offenses. This fact alone does not render Pennsylvania's choice unconstitutional. The *Patterson* Court made a similar point when it stated: *"Nor does the fact that a majority of the states have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those states that strike a different balance are in violation of the Constitution."* (Emphasis added). 432 U.S. at 211.

In the present case, the Petitioner's argument is essentially that the absence of self-defense must be an element of the Ohio crime of Aggravated murder. This position was apparently rejected by the majority in *Moran v. Ohio*, ... U.S. ....., 105 S. Ct. 350 (1984), If this position were correct, then it would necessarily follow that

the State would have to disprove self-defense existence beyond a reasonable doubt even in the case where a defendant does not raise it. Otherwise, the State would be in violation of the *Winship* doctrine that the prosecution must prove every element of the crime charged beyond a reasonable doubt. The illogical result of this premise is only too apparent.

Patterson discussed the affirmative defense of extreme emotional distress which applies with equal force in this situation:

> The State itself was unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state. 432 U.S. at 207.

Perhaps for this very reason this Court in *Leland v. Oregon*, *supra*, decided that a State need not bear the burden of disproving the affirmative defense of insanity beyond a reasonable doubt. The effect of this decision is that lack of insanity was not found to be an element of the offense.

In *Leland*, the Petitioner was charged with first degree murder which required the prosecution to prove premeditation, deliberation, malice and intent. Also, the jury was instructed that to constitute first degree murder, they must find that the defendant's plan to take life was formed in cold blood and not hastily upon the occasion. 343 U.S. at 794-95. The jury was then instructed that if they found the defendant's mental condition to be so affected or diseased that he was unable to formulate a plan or in-

tent to kill in cold blood, then the defendant has not committed a first degree murder. *Id.*

In the present case, the Petitioner's position is that to require a defendant to prove that he acted in self-defense negated the State's burden of proving that he acted purposely and with prior calculation and design.

In order to accept this position, this Court would have to agree that the defendant's burden in *Leland*, that he was unable to formulate the requisite state of mind, would serve to negate the prosecution's burden that he acted with premeditation, deliberation, and malice.

The Court rejected such a position and found that the burden remained on the State throughout the trial to prove the elements of the crime and that the issue of insanity was a *separate* issue set apart from the crime charged. 343 U.S. at 795-96.

Similarly in the instant case, the burden never shifted from the State to the Petitioner to prove that she acted purposely, with prior calculation and design in causing the death of her husband. The Petitioner merely had to carry the burden on the factual issues of self-defense, the existence of which was peculiarly within her knowledge. Moreover, it is important to note that the Ohio law of self-defense places less of a burden upon a defendant than does the issue of insanity. Self-defense justifies the crime charged, and does not require the use of expert testimony. If the statutes were found constitutional in *Leland* and *Rivera*, then the Ohio law on self-defense in the instant case certainly satisfies due process requirements.

The Sixth Circuit in *Carter v. Jago, supra*, discussed Ohio's treatment of self-defense as being in compliance with *Patterson* as follows:

> Allowing a State to treat self-defense as an affirmative defense is consistent with the concerns expressed in *Patterson* for allowing the legislative branch sufficient latitude to define mitigating factors that affect criminality. While forcing the State to disprove self-defense may be wise as a matter of policy, *Patterson* does not authorize judicial modification of a legislature's evidentiary standard in the absence of constitutional infirmities. 637 F.2d at 457, fn. 6.

The Petitioner raises several other arguments, that although lacking any semblance of merit, should be addressed.

First, Petitioner asserts that the right to act in self-defense is universally accepted in this country today and therefore, self-defense is thus elevated to a fundamental constitutional right. This simply is not true. Self-defense has never been recognized as a fundamental right neither in the United States Constitution nor in any existing case law. Nevertheless, the Court need not determine whether self-defense is a constitutionally protected right, since Ohio recognizes that justification for otherwise illegal conduct.

In this case, the Court need only decide whether Ohio can assign the burden of proving self-defense to the defendant. Additionally, this Court might well view the Petitioner's contention with alarm.

If self-defense is a constitutionally protected right, then every case involving a self-defense claim presents a federal constitutional issue. In that event, this Court would have to provide a uniform definition for self-defense which the states would have to follow. A more reasoned approach permits the states to define crimes and defenses as they determine.

The Petitioner relies on the following statement written by Justice Stevens in his dissenting opinion in *McMillan v. Pennsylvania*:

> It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.

The Petitioner has attempted to use this principle to support her argument that the presence or absence of self-defense is a component of a crime that gives rise to a special stigma and to a special punishment. Therefore, Petitioner asserts it must be treated as a "fact necessary to constitute the crime," i.e., an element of the crime.

Not only is this argument based upon a tortured, improper reading of the entire *McMillan* decision, but it is patently incorrect.

As the State of Ohio has unequivocally demonstrated herein, the absence of self-defense is not a component of the crime of Aggravated murder. Similarly, it is not an element of the crime. The absence of self-defense is simply not a "fact necessary to constitute the crime." In the present case, the State of Ohio convinced a jury that Earline Martin killed her husband purposely and with prior calculation and design. The Petitioner failed to demonstrate to the satisfaction of the jury that she acted in self-defense.

Next, the Petitioner relies upon a law review article, Allen, *Mullaney v. Wilbur, The Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEXAS L. REV. 269 (1977).

to support the argument that a State must prove beyond a reasonable doubt each fact necessary to make the punishment and stigma imposed proportional to the offense under the Eighth Amendment.

The Petitioner's argument is based on a "proportionality principle" which requires a State to prove "enough" to justify the imposition of the maximum sentence permissible under the statute.

Contrary to the Petitioner's representation, this Court in *Patterson* did *not* rely on this article to support the above-mentioned Eighth Amendment argument. The *Patterson* Court peripherally mentioned this article in a footnote in support of the following statement: "Other writers have recognized the need for flexibility in allocating the burden of proof in order to enhance the potential for liberal legislative reforms." 432 U.S. at 209, fn. 11. The *Patterson* Court did not even remotely give credence to the Petitioner's Eighth Amendment argument advanced herein.

And with good reason. Neither the United States Constitution nor any Court in this country known to the State of Ohio has advocated such a radical interpretation of the Eighth Amendment.

The primary concern of the drafters in writing the Eighth Amendment was to prevent torture and other barbarous methods of punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). More recently, cases have decided that the Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . ." against which penal measures must be evaluated. *Id.* citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir., 1968). *See also, Gregg v. Georgia*, 428 U.S. 153, 169-173 (1976).

Therefore, the State of Ohio submits that the theory advanced by the Petitioner is unfounded in legal principle without support from any source.

The Petitioner also puts misplaced reliance on the decision of *Holloway v. McElroy*, 632 F.2d 605 (5th Cir., 1980). There the court found that a finding of self-defense negates the essential element of unlawfulness within the meaning of Georgia's murder and manslaughter statutes. The court decided that for the State of Georgia to meet its burden of proving the element of unlawfulness, it must prove beyond a reasonable doubt the absence of self-defense or justification. The Georgia statute differs markedly from Ohio law.

The Petitioner fails to acknowledge that the Georgia statute made unlawfulness an element of the crime. 632 F.2d at 628. In contrast, the Ohio statute of Aggravated murder does not make this an element of the crime. The importance of this fact was emphasized by the court when it included in its opinion a caveat that its holding was a narrow one which did not include within its scope crimes other than voluntary manslaughter as defined by Georgia law. 632 F.2d at 635.

CONCLUSION

In conclusion, Respondent contends that the Ohio affirmative defense of self-defense comports with basic concepts of due process. The decisions of this Court in *Winship, Mullaney, Patterson* and *McMillan*, require the State to bear the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. Ohio's law on self-defense satisfies this requirement. Moreover, Ohio's law satisfies and leaves intact the concept of the presumption of innocence.

We have demonstrated that the Due Process Clause does not prohibit the placing of the burden of proof upon the accused to establish an affirmative defense in justification of the crime charged. This is especially true under Ohio law where self-defense constitutes a separate issue and does not serve to negate any facts of the crime which Ohio has the burden of proving beyond a reasonable doubt.

Finally, Ohio's affirmative defense of self-defense does not exceed the permissible legislative limits that States enjoy in regulating their criminal procedures, defining the elements of their crimes and allocating the burden of persuasion.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

United States Constitution, Amend. XIV, § 1

AMENDMENT 14

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution

Article 1, § 1

§ 1 Inalienable rights.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

STATUTES

Ohio Revised Code

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglery or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference

may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2903.03 Voluntary manslaughter.

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.

§ 2901.05 Burden and degree of proof.

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the bur-

den of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonble doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

§ 2901.21 Requirements for criminal liability.

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;

(2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

* * * * *

(C) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have ended his possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22 of the Revised Code.

§ 2901.22 Culpable mental states.

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disrgards a

known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

Supreme Court, U.S.
FILED
NOV 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-6461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EARLINE MARTIN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Writ Of Certiorari To
The Ohio Supreme Court

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Throughout its Brief, the State portrays self-defense as an affirmative defense, as though that terminology was some magic talisman permitting the State to shift the burden of proof as it pleased. However, while the label "affirmative defense" may evidence the State's intent to shift the burden of proof, it has no meaning in the appropriate analysis of this issue. Since **Mullaney v. Wilbur**, 421 U.S. 684 (1975), **Patterson v. New York**, 432 U.S. 197 (1977), and **McMillan v. Pennsylvania**, ___ U.S. ___, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), this Court has made clear that it will segment what may have historically been called affirmative defenses into those on which the State can oblige the defendant to bear a burden of proof, and those on which the State cannot. Labels nothwithstanding, the relevant questions are only

three: (1) whether, under a functional analysis of the state's definition of elements, one or more elements are necessarily negated by the defense interposed, Brief of Petitioner, at 31-32, **Amicus Curiae Brief**, at 17-23; or (2) whether the issue is one which historically has made a significant difference in punishment and stigma, when evaluating exculpating, as opposed to merely mitigating, issues, **Brief of Petitioner**, at 25-26; or (3) whether the defense identifies constitutionally protected conduct, or conduct that cannot constitutionally be punished, **Brief of Petitioner**, at 10-11, 24-33, **Amicus Curiae Brief**, at 4-14.

Under any of those inquiries, Earline Martin is entitled to a new trial. Self-defense negates an element of aggravated murder in Ohio. Alternatively, as self-defense historically has signified wholly innocent conduct, the burden of proof may not be placed on Petitioner. Lastly, as an

act in self-defense is constitutionally protected conduct, or conduct which cannot constitutionally be made criminal, self-defense necessarily negates a constitutionally necessary element.

I. SELF-DEFENSE NECESSARILY NEGATES ELEMENTS OF THE CRIME OF AGGRAVATED MURDER IN OHIO, AND THE STATE'S ATTEMPT TO LABEL THIS AS AN "AFFIRMATIVE DEFENSE" PROVIDES NO ANALYTICAL ASSISTANCE TO THIS COURT

A. Self-Defense Necessarily Negates The Elements of Aggravated Murder

The State's argument that self-defense negates no elements of the crime leaves the Petitioner at times bewildered, as it appears to at some points concede the issue, and at others begs the question. At page 12 in the Brief of Respondent, the State argues that "by asserting self-defense, an accused does not necessarily admit the elements of the crime, [r]ather, an accused admits doing the act . . ." This appears to be totally inconsistent with the legal formalism approach of the state and federal

authorities at other points relied on by the State, which claim (without any analysis of the elements' relation to self-defense) that the accused asserting self-defense has admitted all the statutory elements of the crime and is asserting a separate issue. In effect, the State has admitted that self-defense admits only the act, but not the crime, and that the defense negates some (as yet unidentified, formal or informal) element(s) of the crime (but not the act element). At page 11 of the Brief of Respondent, the State calls self-defense a "justification for otherwise illegal conduct." The State, here too, implicitly admits that self-defense negates the crime, as it concedes that an act in self-defense is legal conduct. Indeed, the State would be hard-pressed to argue that self-defense does not negate the crime. "A criminal act by definition is not 'within a range of conduct that is generally acceptable.'" Jones v. United States, 463 U.S.

354, 367 (1983), quoting Addington v. Texas, 441 U.S. 418, 426-427 (1979). Acts in self-defense are not condemned by society.[1]

The State offers no authority as it grasps to answer the Petitioner's compelling argument that self-defense negates the elements of prior calculation and design.

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[1] The social acceptance of acts in self-defense likely stems from several philosophical views. One is the self-preservation instinct, e.g. that "the first if not chiefest duty incumbent upon mankind in respect of his brute nature, is his conservation in his animal state." Kant, Metaphysics of Ethics 258 [Semple transl. 1836]. Another related view is that self-sacrifice to unlawful aggression should not be expected from the individual. The last is perhaps that the individual engaged in self-defense acts as an arm of the state, the latter being unable to intervene. In this view, the exercise of self-defense is an anticipated exception to the social contract between the individual and the state. Self-defense has thus been termed one of the "inherent rights, which when [men] enter into a state of society, they cannot, by any compact, deprive or divest their posterity". Constitution of Virginia, June 12, 1776. Perry, Sources of Our Liberties, at 311. See also Mill, On Liberty (1806), reprinted in Wigmore, Rational Basis of Legal Institutions, p. 15 (1969).

All the State can muster is a hypothetical. But that hypothetical amply demonstrates the State's misconception of the issue before this Court. At page 16 of the Brief of Respondent, the State contends that under the facts of its hypothetical,

> ". . . the accused may well have acted with prior calculation and design or killed in self defense. Again, these separate factual determinations are matters for the jury['s] consideration. In the present case, the question whether or not Petitioner acted with prior calculation or design or killed in self-defense was for the jury to resolve." Accord, Brief of Respondent, at 21.

This is, of course, the Petitioner's point -- the jury could not simultaneously find the defendant in the hypothetical, and/or Earline Martin, acted with both prior calculation and design and in self-defense. The two cannot coexist. See State v. Cotton, 56 Ohio St.2d 8, 381 N.E.2d 186 (1978), Brief of Amicus Curiae, at 43-50. The jury is certainly expected "to resolve" this question, but to do so, it must receive constitutionally accurate

instructions on the burden of proof as to these issues. Since the two issues necessarily negate one another, the jury must be told that the burden to prove the absence of self-defense is on the State. See Brief of Petitioner, at 5, and Brief of Amicus Curiae, at 50-55. That omission requires reversal in this case.

It is most revealing that the State relies almost wholly on Sixth Circuit cases to argue that self-defense negates no elements of Ohio crimes, as it demonstrates the lack of Ohio authority analyzing the elements of crimes and their relationship to self-defense.[2]

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[2] Due to the dearth of Ohio authority contrary to Petitioner's position, the Sixth Circuit is in no better position than this Court to determine the issue. Therefore, it would be inappropriate to defer to the Sixth Circuit's "interpretation" of Ohio law, particularly when it is contrary to the plain meaning of the statutes, Legislative Service Commission Notes, jury instruction language, and case law, as here.

The State relies on State v. Morris, 8 Ohio App.3d 12 (1982), see Brief of Respondent, at 18, 20. However, the Morris court considered only the element of unlawfully, and simply rejected its existence due to its absence from the statute defining felonious assault, and on policy grounds of avoiding limitations on the shifting of other burdens of proof to the defendant. Morris, at 18-19. The Morris case provides no significant support for the State's position as it dealt only with that element, and did so without performing the functional analysis required by Mullaney and Patterson. See Amicus Curiae Brief, at 17-23. Morris thus seems to be grounded more in an unwillingness to examine the issue of unlawfully due to the belief that a favorable ruling would undoubtedly impact on other defenses, rather than in any examination of Ohio precedent.

Although the court below and the Respondent tout State v. Poole as grounds

for viewing self-defense as a confession and avoidance, See Joint App., at 39, Brief of Respondent, at 11, the Poole court merely relied on what are now clearly unconstitutional presumptions arising from the homicide, see State v. Poole, 33 Ohio St.2d 18, 19, n.3, 294 N.E.2d 888 (1973), relying on Silvus v. State, 22 Ohio St. 90, 99-100 (1871). Silvus is significant as it is the first Ohio case dealing with the burden of proof as to self-defense, and as it placed the burden of proof on the defendant by presuming the existence of the unlawfulness element from the act of causing the death of another. Silvus, at 99-100, and see Amicus Curiae Brief, at 32-36. The Defendant Silvus had argued for an instruction that the State must prove the killing was unlawful, but the Ohio court refused, stating this instruction "would destroy the presumptions arising from the homicide". Silvus, at 92, and 99-100.

This clearly unconstitutional presump-

tion has not been abandoned, as the court below has simply maintained the consequence of the presumption, by viewing self-defense as a confession and avoidance. See Joint App., at 39, citing Poole, which at 19, n.3, in turn cites to Silvus. Thus, Ohio courts continue to make use of the benefits of this presumption, although none wish to acknowledge its existence, perhaps as they are aware of its many consititutional deficiencies.

While Ohio clings to a notion that the common law permitted the burden to be properly shifted to the defendant as this was viewed as a confession and avoidance, the very jurisdiction in which the common law developed has repudiated that notion. In Woolmington v. The Director of Public Prosecutions, [1935] A.C. 462, 473-482, the House of Lords condemned Foster's Crown Law (1762), p. 255, which had allocated to the defendant the burden of proof as to provocation, as an incorrect statement of

the common law. Later, that same body held the Woolmington decision demanded the prosecution bear the burden as to self-defense, stating it was "clear that the [common law] rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exceptions save only in the case of insanity, which is not strictly a defense." Chan Kau v. The Queen, [1955] A.C. 206. It was Foster's Crown Law which had formed the basis for the decision of King v. Oneby, 2 Ld. Raym. 1485, 92 Eng. Rept. 465 (K.B. 1727) and for the later decision of Commonwealth v. York, 50 Mass. (9 Metc.) 93 (1845). The Ohio Supreme Court relied on all of these repudiated authorities in Silvus, at 99-100.

In essence, no support is available for the State's version of the impact a claim of self-defense has on the elements of crimes.[3]

In conclusion, the State's attempts to

argue that R.C. 2901.05 can properly burden the defendant as this is an "affirmative defense" are simply inadequate. That label has no meaning. Further, the argument that this is a confession and avoidance is fallacious and evasive, as this burden was not initially shifted to the Ohio defendant because it was a confession and avoidance, but rather because it explicitly challenged the existence of an element of the crime, and the state courts did not wish to burden the prosecution with the proof of the issue. Mere conclusory and unsupportable allegations now by the Court below and the State that the issue is one of confession and avoidance, without even bothering with a functional analysis of the elements of Ohio crimes, should not sway this Court.

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[3] See also Mullaney,, at 693-696, and generally Fletcher, Two Kind of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880, 899-910 (1968).

B. Recognition That Self-Defense Negates the Elements of Ohio Crimes Will Have No Impact on Other Defenses

The State seems to rely heavily on the view expressed in **Morris** that a favorable decision for Petitioner would signal the demise of other burdens shifted to the defendant. See **Brief of Respondent**, at 21, and generally 27-32. Even assuming that states generally have the flexibility to define a crime without exempting acts done in self-defense (which the Petitioner certainly rejects, see below), this Court is presented here only with the question of whether self-defense negates Ohio elements, and should evaluate that question in a fair and unencumbered manner. The fact that Ohio courts do not wish to acknowlege elements, and thereby seek to evade the demands of due process as to this and other defenses, cannot be condoned by this Court. **Mullaney**, at 691, n.11.

Furthermore, a conclusion in Petiti-

tioner's favor would not undermine the placement of the burden of proof as to other defenses. In Ohio, some burdens are shifted by means or legislative provision.[4] None of these affirmative defenses involve self-defense.

Further, as none of these defenses appear to negate elements of the crimes as presently defined, or as necessarily defined by the constitution, this Court's reaffirmation of that analytical approach would have no impact.[5]

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[4] These defenses include those in R.C. 2907.32 (pandering obcenity), R.C.2907.31 (disseminating matter harmful to juveniles), R.C. .2907.321 - .323, R.C. 2919.01 (bigamy), R.C. 2919.21 (non-support of dependents), R.C. 2919.23 (interference with custody), R.C.2921.21 (compounding a crime), R.C. 2921.34 (escape), R.C. 2921.36 (illegal conveyance of weapons), R.C. 2921.51 (impersonating a police officer), R.C. 2923.02 (attempt), R.C.2923.03 (complicity), R.C. 2925.14 (selling paraphernalia to juveniles).

[5] It is perhaps possible that the burdens of proof assigned to the defendant in R.C. 2905.04 (child stealing), R.C. 2909.05 (criminal child enticement), and R.C. 2919.23 (interference with custody, first of two affirmative defenses) may be asserted to be improper if this Court rules

Other burdens of proof are assigned to Ohio defendants through the operation of R.C. 2901.05, and the judicial labeling of certain defenses as affirmative. Both self-defense and insanity have been termed such affirmative defenses.

A ruling that the State of Ohio must prove the absence of self-defense would appear to have no impact on the insanity defense. This Court has already concluded that insanity does not inevitably necessarily negate the mens rea element of crimes, by its holding in Leland v. Oregon, 343 U.S. 790 (1952), and its dismissal on the merits in Rivera v. Delaware, 429 U.S. 877 (1976). As insanity does not necessarily negate a mens rea element according to this Court's precedent, the State may clearly punish for the person's act, as their act

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for the Petitioner. However, these defenses present the issue of defense of another, not presented here, and the first two statutes also appear to provide a defense of another on mere grounds of assuring their welfare.

with the requisite mens rea is culpable, even if the person has a mental disease or defect.[6]

Recognition that self-defense does negate an element(s) would be consistent with this Court's precedent respecting insanity. The relationship of the insanity defense to the elements of crimes is fundamentally distinct from the relationship of self-defense to these elements. The act of the not guilty by reason of insanity acquittee is a crime. This Court so recognized in Jones v. United States, 463 U.S. 354, 634, 366 (opinion of the Court, Powell, J.), 380

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[6] Some states may choose to acquit on grounds of insanity, but that is essentially a privilege they bestow on the defendant, a separate issue which can be proven to their benefit. Other states may choose to in fact define their mens rea in a way that necessarily negates insanity. If they so define their mens rea element, then the burden of proof as to insanity cannot be placed on the defendant under this Court's precedent in Patterson. This Court has simply left to the States how they will define the mens rea, and has provided the input that the M'Naughten form of insanity will not inevitably and necessarily negate the mental element of crimes. Leland, at 800-801.

(dissenting opinion of Brennan, J.) (1983). It is not socially acceptable, and it is not in any sense lawful. Jones, at 367. The insane person's act is a crime, but society has excused him from the same stigma and from the form of punishment generally suffered by those who commit unlawful acts, due to the belief that he is not personally blameworthy. Jones, at 369 (opinion of the Court, Powell, J.), 373-374, n.4 (dissenting opinion of Brennan, J.). Therefore, most states provide for a special verdict of not guilty by reason of insanity; others may consider making the criminal behavior more clear by substituting a verdict of guilty but mentally ill. In any jurisdiction, if the act of the "insane criminal," Jones, at 362, were committed by a sane individual, society would certainly punish it as an unlawful act.

As to self-defense, however, the act

committed is socially acceptable, and it is lawful. See Brief of Petitioner, at 23-26 and Amicus Curiae Brief, at 23-32, 37-38, and n.1, infra. While an insanity acquittal is merely a reflection that an individual is not personally blameworthy, with self-defense the act itself is acceptable and not blameworthy. Sovereigns recognize this by providing an outright acquittal, not a conditional one.[7]

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[7] It is true that some foreign jurisdictions draw no such line between self-defense and insanity. The German practice, for instance, is to consider a tripartite structure for ordering all substantive issues relating to the defendant's guilt or innocence, including these two defenses. See Fletcher, supra, 77 Yale L.J., at 914. German judges require the prosecutor to prove (1) that the defendant brought about a result proscribed by the legislature, and (2) that the act was socially unacceptable (unjustified), and finally (3) that the actor was personally blameworthy (without excuse). Id., at 915-917.

While Professor Fletcher argues for adoption of the entire tripartite structure, this Court could readily and succinctly limit the State's obligations under the due process clause to the first two issues, and create no disturbance with its precedent. Indeed, this would also be

Further distinctions are the stigma, or lack thereof, borne by the defendant, and the consequences of a favorable verdict. "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself." Jones, at 367, n.16. The insane individual's conditional acquittal may automatically result in an involuntary, indefinite commitment, Jones, see also, La Fave & Scott, Criminal Law (1986, 2d ed.), at Sec. 4.1, p. 304. An acquittal due to self-defense, however, is complete, carries no stigma, and no deprivation of liberty.[8]

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consistent with the Court's continuing reference to the constitutional limits on the State in defining crimes. If an issue, such as self-defense, has the lengthy and unwavering pedigree of being socially acceptable conduct, the State cannot legitimately exercise its police power to treat it as criminal, or to require the defendant to prove the issue. See generally Brief of Petitioner, at 24-31, Amicus Curiae Brief, at 4-14, and below.

[8] This distinction between self-defense and insanity is consistent with language recently used in McMillan v. Pennsylvania, at 2416, where this Court reinforced the proposition that neither Mullaney nor

A final distinction is the language utilized to describe the defenses. Courts and individuals commonly speak of the "right" to use force in self-defense (including the trial court below, see Joint App., at 21). No one speaks of a right to kill while insane.

The insanity defense and the defense of self-defense are thus so diametrically opposed that a ruling favoring Petitioner will not dilute the strength of this Court's previous cases relating to insanity. A thorough review of the possible impact on other defenses of a decision favorable to the Petitioner reveals the emptiness of the State's repeated reliance on an in terrorem effect. As self-defense necessarily negates one or more elements of the crime of aggravated murder, the burden of proof respecting it could not be shifted

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Patterson require a state to bear the burden on a defense that merely affects the degree of culpability or the severity of the punishment.

to the Petitioner Earline Martin under this Court's precedent.

II. WHEN A FACT ALTOGETHER EXCULPATES THE ACCUSED FROM ANY STIGMA AND PUNISHMENT, AND THE ACT IS HISTORICALLY RECOGNIZED BY ALL TO BE WHOLLY INNOCENT AND ABSENT OF CRIMINAL WRONGDOING, THEN THE STATE MUST BEAR THE BURDEN OF PROOF ON THAT ISSUE.

There are sound reasons for this Court to decline to provide the same level of flexibility to the States in allocating burdens of proof for wholly exculpating factors, as opposed to factors that merely affect the degree of culpability or severity of punishment. (The latter factors are those which result in conviction for a lesser offense, or in a special verdict indicating excused conduct, or possibly identifying a different form of punishment and assigning some level of stigma.) See Brief of Petitioner, at 20-23, 25-26, and Amicus Curiae Brief, at 57-63. Contrary to the State's assertions that Patterson dealt with factors which completely exculpate,

Brief of Respondent, at 24, all the Court had before it was an affirmative defense which reduced punishment, i.e., mitigated the offense. Similarly, in McMillan, the issue only related to sentencing, after a reliable guilt determination had been made. Thus, both Patterson and McMillan dealt with issues affecting the severity of punishment, not the issue of guilt or outright acquittal as to all crimes charged.

The issue of a separate test for wholly exculpating factors thus has not yet been resolved by this Court. Petitioner believes this case will test the Court's willingness to allow the presumption of innocence to be swallowed whole in the name of legislative flexibility. For if this Court carefully examines the State's claim for legislative flexibility here, it will find no fair and substantial basis for this allocation of the burden of proof.

The State has not argued, nor could it, that it has expanded the availability

of the defense to the benefit of the defendant. Compare Patterson, at 209, n.11. Ohio has defined self-defense in the same manner for over a century. See State v. Melchior, 56 Ohio St.2d 15, 20-21 (1978) (and cases cited therein). No greater or more ameliorative right to self-defense is provided than the minimal scope of the defense, as identified at common law. See Erwin v. State, 29 Ohio St. 186, 188-196 (1876) (adopting the views of English writers in defining the right). The State argues the general language of Patterson, at 209, that burdens may be allocated when the State concludes they are too cumbersome, too expensive, and too inaccurate. Brief of Respondent, at 28. However, there this Court was speaking to mitigating factors. Even if this Court applied such an approach to a wholly exculpatory factor of historical significance, it should at the least carefully examine the State's claim.

The State's only allegation as to cum-

bersomeness is a burden on the State in its case-in-chief, see Brief of Respondent, at 29-30. However, the defendant can certainly be obliged to bring forth some evidence of self-defense before an instruction will be provided. Ulster County Court v. Allen, 442 U.S. 140, 157-158, n.16 (1979). United States v. Bailey, 444 U.S. 394, 414-415, 417 (1980). This is the present practice in Ohio, see State v. Melchior, and removes the asserted cumbersomeness as the State need not present evidence negating self-defense until this is put in issue by their own evidence, or the defendant's case. Similarly, the State's assertion that the accused should bear the burden of proving self-defense because the accused is in a superior position to know of it and provide evidence, Brief of Respondent, at 11, is certainly a rational justification for requiring him to come forward with evidence, as the State at one point argued. See Brief of Respondent, at 13. But this

argument provides no support for placing the burden of proof on the defendant. See Mullaney, at 702, and Amicus Curiae Brief, at 16-17.

The State's last contention is the unsupported allegation of the threat of false claims of self-defense. Brief of Respondent, at 10-11. Even if one concedes the existence of a risk of false claims, there is no proffer from the State that shifting the burden of proof to it will result in any increase in false claims. Further, to the extent a choice is to be made between diminishing the risk of convicting an innocent person, and diminishing the risk of acquitting a guilty one, this country's system of justice has consistently chosen the former. Speiser v. Randall 357 U.S. 513, 525-526 (1958), and In Re Winship, 397 U.S. 358, 370-372 (Harlan, J., concurring).

Lastly, other measures more than adequately protect against false claims and the alleged societal harm of acquitting the

guilty. False claims are countered by a requirement that the defendant come forward with some evidence, by the threat of a perjury prosecution, and by impeachment. The State can permissibly use the defendant's prearrest silence, or his failure to provide exculpatory information to the police prior to the administration of **Miranda** warnings, for impeachment and in closing argument. **Jenkins v. Anderson**, 447 U.S. 231 (1980), **Fletcher v. Weir**, 455 U.S. 603 (1982). To avoid surprise the prosecution could also seek adoption of a rule requiring a notice of intent to rely on self-defense, see **Williams v. Florida**, 399 U.S. 78 (1970), or simply seek a sequestration of defense witnesses, or a continuance. This Court has also approved other deterrents to defendant perjury, by permitting the defense counsel to threaten to disclose his client's intended perjury, **Nix v. Whiteside**, ___ U.S. ___, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and by permitting the

trial judge to consider the presentation of false testimony in sentencing the defendant, United States v. Grayson, 438 U.S. 41 (1978). Finally, the trier of fact will be instructed to apply the same standards of credibility that they do respecting other evidence, and the interest or bias of defense witnesses will be properly considered. See e.g., Joint App., at 9, and Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

Petitioner not only disputes the State's assertion that the "elements" of self-defense are "subjective," Brief of Respondent, at 13, but questions its relevance. The facts relevant to self-defense are no more subjective, and probably far less so, than the mens rea elements of homicide or the absence of accident. Yet the prosecution proves these elements. Self-defense is based on objective criteria, and on evidence of a type commonly presented to, and evaluated, by juries.[9]

In short, the State's claims for flexibility do not withstand the careful examination this Court should employ when the burden of proof as to a wholly exculpatory defense is at issue.

III. THE STATE HAS EXCEEDED THE CONSTITUTIONAL LIMITS IN DEFINING ITS CRIMES, AS SELF-DEFENSE IS A CONSTITUTIONALLY PROTECTED RIGHT, OR CONDUCT FOR WHICH A DEFENDANT CANNOT CONSTITUTIONALLY BE PUNISHED.

The State makes much of its need for flexibility, but a claim for legislative flexibility is simply illegitimate in the context of this case. In Patterson, this Court expressed its concern that if Mullaney is read too broadly, its "practical effect . . . might be to undermine legislative reform of our criminal justice system." Patterson, at 214, n.15. States

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[9] Here again, self-defense differs from insanity. While this Court has recognized the difficulties and uncertainties associated with psychiatric testimony, Addington v. Texas, 441 U.S. 418, 430 (1979), self-defense cases are not dependent on such testimony.

might be put "to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict for a crime which otherwise is within its constitutional powers to sanction by appropriate punishment." Id., at 208.

The State is not presented with such a choice here, as the State has no constitutional power to criminalize or punish an act of self-defense. While in Patterson it was not disputed the State may constitutionally criminalize and punish Patterson's act of unjustified homicide, there is most certainly a dispute in this case. This case not only tests the "constitutional limits beyond which the States may not go in defining crimes," Patterson, at 210, but clearly demonstrates that the State of Ohio has exceeded those limits.

A. Self-Defense Is A Fundamental Right.

The State apparently does not dispute

that the right to act in self-defense is universally accepted in this country today. See Brief of Respondent, at 32. Rather, the State argues that as the right has never been recognized as a fundamental right, it creates no limitation on the State's definition of offenses. Id. This argument truly begs the question presented to this Court. The issue will not be raised unless a State has acted to infringe this right, and only two States, Ohio and South Carolina, have acted to allocate the burden as to self-defense so as to raise the issue. See Amicus Curiae Brief, at A-4 to A-12. In the Petitioner's view, it is far more significant that no courts have ruled to the contrary.[10]

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[10] The Ohio courts below were presented with this issue, but only the dissenting justices reached the question. See Joint Appendix, at 35, 43-45. Nor has the Sixth Circuit rejected the existence of this right when it was presented in Ohio cases. That Court has simply refused to consider the issue, or its relevance to allocation of the burden of proof to Ohio defendants. In White v.Arn, 788 F.2d 338, 347, n.15,

Indeed, if this Court were to accept the State's contention that self-defense is not a fundamental right, Brief of Respondent, at 32, and that the federal constitution permits the State to punish one who acted in self-defense, its decision would likely shock our citizens. "[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear" and "would shock the moral sense of any civilized community". Holmes, The Common Law, at 49-50. See also Brief of

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(6th Cir. 1986), the court "decline[d] to dispose of this case on a novel, unaccepted theory," and limited itself to the Patterson elements analysis, while stating its holding did "not reject the notion that a defendant has a limited right to act in self defense under certain circumstances." As South Carolina is the only other state apparently attempting to allocate this burden to the accused, the issue could be expected to be raised there. It was presented in Griffin v. Martin, 785 F.2d 1172, 1192-1193 (4th Cir. 1986), but the decisive concurring judge found it unnecessary to reach the issue. The panel opinions were recently withdrawn, due to an equally divided court on rehearing en banc, 795 F.2d 22 (4th Cir. 1986).

Petitioner, at 24-30, and Amicus Curiae Brief, at 4-14.

The ancient roots of the right of self-defense are to be found in those documents traditionally consulted by this Court. Review of Judeo-Christian teachings, common law treatises, colonial charters and state constitutions, as well as contemporary domestic and foreign laws all confirm the fundamental nature of the right to self-defense.

References to killing in self-defense in the Bible and the Talmud consistently recognize the act as being without blame; some passages reflect what appears to be a positive duty to act in self-defense. See Appendix, at RA-1. The English common law recognized the right of self-defense and of acquittal. See Appendix, at RA-1. The right to self-defense, with the right to community defense or defense of others, was promptly adopted in the colonial charters

of New World settlements. See Appendix, at RA-2. As the states wrote their first constitutions, the right to "the enjoyment of life and liberty, with the means of . . . pursuing and obtaining happiness and safety" was guaranteed, and identified as "[an] inherent right, which when [men] enter into a state of society, they cannot, by any compact, deprive or divest their posterity." Constitution of Virginia, June 12, 1776. Sources of Our Liberties, at 311 (emphasis added). The Constitution of Pennsylvania, August 16, 1776, included as one of the "natural rights of men," "enjoying and defending life and liberty." Sources, at 328, 329 (emphasis added). See also Appendix, at RA-3.

Present state constitutions further establish the right to defend oneself as fundamental. State constitutional provisions formally recognizing a constitutional right to act in self-defense exist in

thirty-two states. See Appendix, at RA-3-9. These provisions take one of two forms, either identifying defending life as a natural right, or linking the citizen's right to bear arms to a right to act in defense of himself. Id.

Recognition of the right to act in self-defense is also given in a number of international documents, including the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, and in the criminal codes of many sovereign nations. See Appendix, at RA-9 for texts. Indeed, Petitioner can find no evidence of any sovereign even attempting to criminalize or punish such conduct. Further recognition of the right is found in international law. See Appendix, at RA-10.

In the face of such unanimous authority, there can be no doubt of the fundamental nature of the right of self-defense.

This right rests within the very bedrock of our traditional system of justice, and to criminalize such conduct would surely shock the conscience of our people.

B. As Self-Defense Cannot Be Criminalized Or Is A Fundamental Right, To Convict The Petitioner The State Must Bear The Burden Of Proving Beyond A Reasonable Doubt That The Petitioner Was Not Acting In Self-Defense.

1. This Court's Precedent Respecting Allocation Of The Burden Of Proof Demands That The State Bear This Burden.

This Court has repeatedly stated that there are constitutional limits to the State's power of defining crimes and prescribing penalties. McMillan, at 2417, citing Patterson, at 210. The State of Ohio has clearly exceeded those limits by refusing to acknowlege that self-defense negates an element of Ohio crimes, or at the least to admit that Ohio statutes must be so construed. The ultimate and inevitable result of so defining the crime is that Ohio defendants will be punished (in this case with life imprisonment, Joint

App., at 1) when it is as likely as not that they are exercising their fundamental right of self-defense, and engaging in lawful conduct.

This Court recently stated that "in certain limited circumstances Winship's reasonable doubt requirement applies to facts not formally identified as elements of the offense charged." McMillan, at 2417. There can be no question that one of those limited circumstances arises when the State fails to apply the Winship reasonable doubt requirement to constitutionally necessary facts, i.e., facts without which a criminal statute will deny constitutional rights by sweeping too broadly into areas of protected freedom.

The State's single sentence response to this issue is that this Court "need not determine whether self-defense is a constitutionally protected right, since Ohio recognizes that justification for otherwise illegal conduct." Brief of Respondent, at

32. If this Court concludes the State is correct in its assessment, then there are in fact no constitutional limits on the State's allocation of the burdens of proof. The State could evade all constitutional questions in the overbreadth of its statutes by simply shifting the burden of proof as to those facts to the defendant. Not only would such a ruling from this Court invite significant intrusions on personal liberties by legislatures and courts, but it would cheapen the reasonable doubt standard to the point where it becomes an ancient relic, an empty promise of fairness and certitude in our criminal justice system.

There is simply no support for the State's position that it can shift the burden of proof as to constitutionally necessary elements.

When this Court has found that criminal statutes infringed on constitutional rights of the accused, its remedy has been

to require the State to limit the statute's scope. See e.g., Talley v. California, 362 U.S. 60, 64-65 (majority opinion), and 66 (Harlan, J., concurring) (1960); Griswold v. Connecticut, 381 U.S. 479, 507 (White, J., concurring in judgment) (1965); Lambert v. California, 355 U.S. 225, 227 (1957). This Court has then uniformly required the State to bear the burden of proving these constitutionally necessary facts. See e.g., Healy v. James, 408 U.S. 169, 186 (1972) (citing cases); Lambert, at 229; Powell v. Texas, 392 U.S. 514, 544 (Black, J., with Harlan, J., concurring) (1968). See also Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

Indeed, the strongest case denouncing the State's argument is one of those most frequently cited when discussing these constitutional limitations: Speiser v. Randall, 357 U.S. 513 (1958), cited with approval, Patterson, at 201-202, and McMillan, at 2416. In Speiser, this Court

struck down California legislation which required that a taxpayer seeking a tax exemption prove he had not advocated the overthrow of the government. This Court concluded that to avoid a discriminatory denial of a tax exemption, due process required the State bear the burden of proving the taxpayers engaged in criminal speech.

When this Court has required such a burden be borne by the State before it could deny a tax exemption, it is surely inappropriate for the Respondent to assert that the State must be relieved of such a burden in an aggravated murder case with life imprisonment in the balance.[11]

The State of Ohio has far exceeded the constitutional limits in defining the crime

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[11] Even in contexts other than the proof of crimes, this Court has required the State prove the absence of intrusion on constitutional rights, although the Court may permit a mere preponderance showing. See e.g., Doe v. U.S. 465 U.S. 605, 614, n.16 (1984) [government must make a showing

of aggravated murder, and under this Court's precedent, that demands a reversal.

2. Even If A Different Analysis Is Utilized, At A Minimum The State Would Be Required To Prove A Compelling State Interest to Justify Burdening The Petitioner's Right. The State Has Not Proven Such A Compelling State Interest.

Even if this Court were to consider significantly altering its present approach to the constitutional limits on the State's defining of crimes [an alteration which will likely invite wholesale intrusions on other rights in a similar manner], it would be totally inappropriate to do so in the absence of any compelling state interest. This Court has required that the State demonstrate a compelling state interest before it can infringe on protected rights,

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that complying with subpoena duces tecum will not deny Fifth Amendment privilege]; **Lego v. Twomey**, 404 U.S. 477 (1972) [government must prove confession was voluntary]. Earline Martin did not even receive that degree of respect for her rights. She was convicted when it was as likely as not that she had acted in exercise of her constitutional rights.

and Ohio must do so if it is to literally burden the constitutional rights of Earline Martin. Shelton v. Tucker, 364 U.S. 479, 488 (1960). The State has utterly failed to make such a compelling showing here.

No compelling need exists to burden the defendant in exercising this right as opposed to others. The State's unsupported allegations of the threat of false claims of self-defense can be effectively dealt with by other measures. See Argument II, above. To the extent a choice must be made between diminishing the risk of convicting an innocent person, and diminishing the risk of acquitting a guilty one, this country's system of justice has consistently chosen the former. Speiser, at 525-526, and Winship, at 370-372 (Harlan, J., concurring).

The State's argument that this Court should refrain from identifying self-defense as a fundamental right, or as conduct that cannot constitutionally be punished,

as this would require the Court to provide a "uniform definition for self-defense," Brief of Respondent, at 32, is also unavailing. This Court has not found it necessary to define intent, **mens rea**, or act, although it has restrained the states in punishing in the absence of these facts. See **Lambert**, **Powell**. Further, the issue is simply not present here. The Ohio definition of self-defense is the minimal common law test, and identifies an act which for centuries has not been deserving of punishment. This issue, unlike insanity, rests on objective facts that have maintained their essential structure for aeons. To argue that the right should not be recognized as the task will be too difficult is simply inaccurate, and proves too much. Under the State's view, this Court should simply refrain from considering issues of fundamental fairness to ease its workload. Petitioner believes that the citizens of this country deserve more protection than

that view accords them.

The State's contention that it will be unable to prosecute is also belied by the fact that all but two states require the prosecution to bear this burden of proof. Brief of Amicus Curiae, at A-4 to A-12. The State correctly asserts that the fact that other jursdictions have chosen to assume this burden does not, in and of itself, require the burden be assumed by other states, Brief of Respondent, at 29, citing Patterson, at 211. However, here the Court is presented with impermissible criminalizing, or impermissible burdening of a constitutional right. The fact that an overwhelming number of jurisdictions[12] have not found it necessary to so burden the right surely disputes the State's claim

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[12] See also Appendix, at RA-11 for references to a sampling of foreign jurisdictions placing the burden of proof on the prosecution to prove the absence of self-defense beyond a reasonble doubt.

of a compelling state interest. See e.g., Ballew v. Georgia, 435 U.S. 223, 244 (1978).

This Court's precedent requires the State bear the burden of proving the Petitioner did not act in self-defense, as the State cannot criminalize such conduct. Even if a different approach is used, and the State's asserted purpose is deemed legitimate, it is clear that less drastic means are available to the State to achieve their asserted purpose. The State violated the Consititution by placing the burden of proof respecting self-defense on the Petitioner.

Its practice needlessly and significantly increased the risk of convicting a wholly innocent individual.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Briefs of Petitioner and Amici, the Petitioner's conviction should be reversed by this Court.

Respectfully submitted,

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APPENDIX

A P P E N D I X

"ANCIENT ROOTS" OF THE RIGHT OF SELF-DEFENSE

Judeo-Christian Teachings

Exodus XXII, 1: "If a thief be found breaking in, and be smitten so that he dieth, there shall be no blood-guiltiness for him." [Interpreted as] "The following must be saved [from sinning] even at the cost of their lives: he who pursues after his neighbor to slay him." The Babylonian Talmud, Sanhedrin (72a. 72b, and 73a), (emphasis added) and Berakoth (62b) ["And the Torah has said, If one comes to kill you, rise and kill him first," "stand not idly by, but save [the assailant] from committing such a great sin [by slaying him]."]

English Common Law

Perkins on Criminal Law, 2nd ed., 1969, at 1001: [The English common law recognized an act done in self-defense was to be treated differently than a criminal homicide, and was either justifiable (meriting acquittal), or excusable (meriting only a forfeiture of goods and custody until a pardon was received).]

24 Henry VIII, c.5 (1532) [Full text appears at Perkins, at 998, and n.30] This statute [said by Hale to be "declarative" of the common law, Id.] provided that those who acted in self defense were to be "fully acquitted and discharged."

Colonial Charters and Statutes

[All page references are to Perry, Sources of Our Liberties, 1978)]

The First Charter of Virginia, April 10, 1606: provided that the colonists shall "from time to time, and at all times forever hereafter, for their several Defences, encounter, expulse, repel, and resist . . . every person . . . that shall enterprise or attempt . . . the Hurt, Detriment or Annoyance, of the said several Colonies." [At 43.] See also The Charter of the Massachusetts Bay [at 94].

The Massachusetts Body of Liberties (December 10, 1641):

The Liberties of Women, No. 80: "Everie marryed woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assalt." [At 156] (emphasis added).

When defining murder, Capital Laws, section 4, (referring to the Scriptures): "If any person committ any wilfull murther, which is manslaughter, committed upon premeditated mallice, hatred, or Crueltie, not in a mans necessarie and just defence, nor by meere casualtie against his will, he shall be put to death." [At 94.]

[There appears to be little other reference to self-defense in the recitation of liberties enjoyed of colonists, most likely as the right to self-defense was so inherent in the nature of colonial living that it was deemed unnecessary, and as the colonists consistently claimed the rights of Englishmen which included the right of self-defense. See e.g., Charter of Maryland [at 109].]

Early State Constitutions

Those first state constitutions which paralleled the phrasing of the Pennsylvania Constitution, in providing the right to enjoy and defend life [page cites are to Sources of Our Liberties]:

The Constitution of Vermont (July 8, 1777) [at 364].

The Constitution of Massachusetts (October 25, 1780) [at 374].

The Constitution of New Hampshire (June 2, 1784) [at 382].

Present State Constitutions

State Constitutions Identifying Self-Defense As A Natural And Inalienable Right:

Massachusetts Const. Art I: All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; . . . Mass. Const. Part I, Art. I (emphasis added).

California: All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and obtaining safety . . . Cal. Const. Art. I, Section 1 (emphasis added).

Delaware: Through Divine goodness, all men have by nature the rights of . . . defending life and liberty . . . as these rights are essential to their welfare, for due exercise thereof, power is inherent in them . . . Del. Const., Preamble (emphasis added).

Iowa: All men are, by nature, free and equal, and have certain inalienable rights -- among which are those of enjoying and defending life and liberty . . . and pursuing and obtaining safety and happiness. Iowa Const. Art. I, Section 1 (emphasis added).

New Hampshire: All men have certain natural, essential, and inherent rights -- among which are, the enjoying and defending life and liberty; . . . N.H. Const. Pt. I, Art. 2 (emphasis added).

New Jersey: All persons are by nature free and independent, and have certain natural and unalienable rights, among which are, those of enjoying and defending life and liberty . . . and of pursuing an obtaining safety . . . N.J. Const. Art. I, Section 1 (emphasis added).

North Dakota: All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; . . . pursuing and obtaining safety and happiness. N.D. Const. Art. I, Section 1 (1984) (emphasis added).

Ohio: All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . . and obtaining . . . safety. Ohio Const. Art. I, Section 1 (emphasis added).

West Virginia: All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or a divert their posterity, namely: the enjoyment of life and liberty . . . and of pursuing and

obtaining . . . safety. W. Va. Const. Art. 3, Section 1 (emphasis added).

State Constitutions Linking An Individual Citizen's Right To Bear Arms To A Right To Act In Defense Of Self:

- Alabama: That every citizen has a right to bear arms in defense of himself and the state. Ala. Const. Art. I, Section 26 (emphasis added).

Arizona: The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men. Ariz. Const. Art. II, Section 26 (emphasis added).

Colorado: The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons. Colo. Const. Art. II, Section 13 (emphasis added).

Connecticut: Every citizen has a right to bear arms in defense of himself and the state. Conn. Const. Art. I, Section 15 (emphasis added).

Florida: The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. Fla. Const. Art. I, Section 8 (emphasis added).

Indiana: The people shall have a right to bear arms, for the defense of themselves and the State. Ind. Const. Art. I, Section 322 (emphasis added).

Kansas: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power. Kan. Const. Bill of Rights, Section 34 (emphasis added.).

Kentucky: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons. Ky. Const. Section 1 (emphasis added).

Michigan: Every person has a right to keep and bear arms for the defense of himself and the state. Mich. Const. Art. I, Section 6 (emphasis added).

Mississippi: The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons. Miss. Const. Art. III, Section 12.

Missouri: That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons. Mo. Const. Art. I, Section 23 (emphasis

added).

Montana: The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons. Mont. Const. Art. II, Section 12 (emphasis added).

New Mexico: No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. N. M. Const. Art. II, Section 6 (emphasis added).

Ohio: The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. Ohio Const. Art. I, Section 4 (emphasis added).

Oklahoma: The right of a citizen to keep and bear arms in defense of his home, person, property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons. Okla. Const. Art. II, Section 26 (emphasis added).

Oregon: The people shall have the right to bear arms in defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power. Or. Const. Art. I, Section 27 (emphasis added).

Pennsylvania: The right of the citizens to bear arms in defence of themselves and the State shall not be questioned. Pa. Const. Art. I, Section 21 (emphasis added).

South Dakota: The right of the citizens to bear arms in defense of themselves and the state shall not be denied. S. D. Const. Art. VI, Section 24 (emphasis added).

Texas: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime. Tex. Const. Art. I, Section 23 (emphasis added).

Utah: The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. Utah Const. Art. I, Section 6 (emphasis added).

Vermont: That the people have a right to bear arms for the defence of themselves and the State -- and as standing armies in time peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power. Vt. Const. Ch. 1, Art. 16 (emphasis added).

Washington: The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. Wash. Const. Art. I, Section 24 (emphasis added).

Wyoming: The right of citizens to bear arms in defense of themselves and of the state shall not be denied. Wyo. Const. Art. I, Section 24 (emphasis added).

Declarations and Conventions:

The Universal Declaration of Human Rights: Article 3. Everyone has the right to life, liberty and security of person." General Assembly Resolution 217 A (III), November 10, 1948, Official Records III.1, Resolutions (A/810), p. 71.

The Convention for the Protection of Human Rights and Fundamental Freedoms: Article 2. (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is not more than absolutely necessary -- (a) in defense of any person from unlawful violence; . . ." (Rome, November 4, 1950), 213 U.N.T.S. 221: European Treaties Series No. 5.

Foreign Criminal Codes:

Criminal Code of the USSR: Article 13 of the CL Fundamentals, and the Decision of the Plenum of the USSR Supreme Court of December 4, 1969, "Practice of courts in the application of legislation on necessary defenses": [The latter speaks of the "indefeasible right of the citizens for defense." Soviet law requires "social danger" as the main characteristic of a crime. The USSR "stipulates two circumstances which exclude social danger of an action, and whose presence negates crimin-

ality even if the action results in harmful consequences. They are self-defense (also called necessary defense) and necessity!" Bassuiouni and Savitski, eds., The Criminal Justice System of the USSR (1979), at 157-158.]

A Sampling Of Criminal Codes Recognizing There Is No Offense When An Act Is Done In Self-Defense:

[As identified in the American Series of Foreign Penal Codes].

Austrian Penal Code, Sec. 1
Canadian Criminal Code, Secs. 34-37
Danish Criminal Code, Chap. III, Sec. 13(1)
French Penal Code, Arts. 64, 328 & 329
German Penal Code, Sec. 53
Greenland Criminal Code, Sec. 5
Japanese Draft Penal Code, Arts. 13, 14
Korean Criminal Code, Arts. 12, 21
People's Republic of China Criminal Code, Art. 17
Norwegian Penal Code, Secs. 47, 48
Polish Penal Code, Arts. 1, 22
Romanian Penal Code, Art. 44
Swedish Penal Code, Chap. 24. Sec. 1
Swiss Penal Code, Art. 33
Turkish Criminal Code, Sec. 49

International Law Recognition of the Right of Nations to Act in Self-Defense:

The Charter of the United Nations: Article 51, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense."

A Sampling Of Foreign Authorities Placing The Burden Of Proof On The Prosecution To Prove The Absence Of Self-Defense:

Adenaes, The General Part of The Criminal Law of Norway (1965), at 94-95.

Howard, Australian Criminal Law (1965), at 20.

Golzuklu, Turkish Code of Criminal Procedure of 1929 (1962), at 6.

Japanese Draft Penal Code, Art. 13, 14.

Yadin, Israel Criminal Procedure (1967), at 142.

Mulder (1978) 40 C.C.C. (2d) 1 (Ont. C.A.) (Canada).

Chan Kau v. The Queen, [1955] A.C. 206 (England).

Decision of the Plenum of the USSR Supreme Court of December 4, 1969, "Practice of courts in the application of legislation on necessary defenses".

MOTION FILED
MAR 21 1986

No. 85-6461

In the Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN, Petitioner,

vs.

STATE OF OHIO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR OHIO PUBLIC DEFENDER COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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NO. 85-6461

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

EARLINE MARTIN, Petitioner,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Ohio Public Defender Commission hereby respectfully moves for leave to file the attached brief **amicus curiae** in support of petitioner in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of the Ohio Public Defender Commission in this case arises from the fact that it and other appointed counsel in Ohio represent many criminal defendants similarly situated to petitioner. The issue raised by petitioner of concern to **Amicus** is Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of evidence. **Amicus** represents the interests of a large number of Ohio attorneys who believe that Ohio law on this issue is in conflict with the Due Process Clause of the Fourteenth Amendment.

In the instant case, **Amicus** believes the resolution of this issue will depend on whether this Court finds that self-defense negates any facts necessary to prove the crime of aggravated murder under Ohio law. See

Patterson v. New York, 432 U.S. 197, 206-207. While petitioner's argument broadly addresses this issue, **Amicus** believes that the brief he is requesting permission to file will contain a more detailed analysis of the pertinent elements of Ohio law and their relationship to self-defense. Additionally, the brief **amicus curiae** contains a discussion of where the federal courts and other states stand on this issue, not contained in petitioner's brief.

For these reasons, **Amicus** requests leave to file the attached brief **amicus curiae** in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of March, 1986, three copies of the foregoing Motion for Leave to File Brief **Amicus Curiae** and Brief **Amicus Curiae** were mailed, first-class postage prepaid, to James R.

Willis, Esq., Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to John T. Corrigan, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

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INTEREST OF AMICUS CURIAE

The Ohio Public Defender Commission was created by Ohio law in 1976. Its purpose is to provide, supervise, and coordinate legal representation at state expense for indigent and other persons. Ohio Revised Code Section 120.01. One of our primary responsibilities is to provide legal representation to criminal defendants in felony trials, appeals and post-conviction matters. Additionally, the Commission provides technical aid and assistance in criminal cases to county public defenders and appointed counsel throughout the State of Ohio. As a result, the Commission is concerned with the case at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants. Petitioner's written consent to the Commission's filing a

brief **amicus curiae** in support of petitioner has been filed with the Clerk's office. Respondent's consent was requested but refused.

The Commission has represented clients in criminal cases before this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Northern and Southern Districts of Ohio, respectively. The Commission has also filed **amicus** briefs in various Ohio courts in other actions which involved the rights of criminal defendants.

The instant case is of interest to the Commission and its attorneys for several reasons. To begin with, this is an Ohio case and involves interpretations of Ohio law. The issue presented by this case further involves

the State of Ohio's power to define criminal conduct in a homicide case and legitimately place the burden of proof on the accused of showing that she acted lawfully in self-defense. The resolution of this issue will directly affect how Commission attorneys and other members of the criminal defense bar in Ohio handle cases involving the issue of self-defense. Finally, other Ohio defendants, similarly situated to petitioner herein, are being represented by Commission attorneys and will be directly affected by the outcome herein.

SUMMARY OF ARGUMENT

The **Amicus** submits that the decision below is erroneous for three primary reasons. First, the defense of self-defense, if present in a criminal case, establishes that the actor was engaged in lawful, innocent behavior.

Since this Court's decision in **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring a defendant to prove her innocence, the State of Ohio is barred from burdening Ms. Martin with proving self-defense.

Second, under an elements analysis stemming from **Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York**, 432 U.S. 197 (1977), self-defense negates several elements of the crime of aggravated murder; to wit:

1. criminal conduct;
2. criminal intent (purposely, with prior calculation and design)[**see** Revised Code Section 2903.01(A)];
3. voluntary act requirement [**see** Revised Code Section 2901.21(C)];
4. "peace and dignity" requirement

of the Ohio Constitution [Article IV, Section 20 and Revised Code Section 2941.06];

5. unlawfulness.

Finally, **Amicus** submits that an examination of the Ohio Supreme Court's decision below establishes that the Court misperceived the letter and spirit of **Mullaney/Patterson.** In its attempt to fall within **Mullaney/Patterson**, the Ohio Supreme Court misused the term "justification" for criminal conduct and blindly applied the label "affirmative defense" as if to insulate from closer scrutiny the very nature of the defense asserted. Labels notwithstanding, the common law of Ohio treats justifiable homicide as a lawful act. As a lawful act, the burden of proof may never lie with the Petitioner, but rather self-defense must be negated by the State of Ohio.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE STATE MAY CONSTITUTIONALLY REQUIRE THE ACCUSED IN A HOMICIDE CASE TO PROVE THAT SHE ACTED LAWFULLY IN SELF-DEFENSE.

This case presents this Court with the opportunity to draw a bright line as to the parameters of a state's power to define its crimes. This Court has long held that it is the business of the states to deal with and prevent crime. **Irvine v. California**, 397 U.S. 128, 134 (1954). Nonetheless, if, in the exercise of this plenary power, the state violates a principle deeply rooted "in the traditions and conscience of our people as to be ranked as fundamental", that act is unconstitutional. **Patterson v. New York**, 432 U.S. 197, 202 (1977), [citations omitted].

Relevant to the case at bar are two principles born from **Mullaney v. Wilbur**, 421 U.S. 684 (1975); **Patterson, supra**; and **Sandstrom v. Montana**, 442 U.S. 510 (1979). First, a state may not set forth elements of a crime and then obtain the benefit of a presumption on any of those elements. Second, it is clear that the state may not establish elements and then burden the defendant with negating those elements, even though the elements were proven by the state. The case at bar is concerned with both principles arising from **Mullaney, supra**; **Patterson, supra**; and **Sandstrom, supra**.

Mullaney dealt with a charge of murder under Maine law. In order to convict on that charge, the State had to prove that the killing was unlawful and intentional. The Supreme Court of Maine

had held that these were the only two elements. **See State v. Lafferty**, 309 A.2d 647, 664 (Me. 1973)[malice is not an element of murder]. However, the Maine Supreme Court, in **Lafferty**, held that "a killing becomes unlawful and punishable as 'murder' on proof of 'any deliberate, cruel act, committed by one person against another, suddenly without any or without a considerable provocation'" (emphasis added). **Id.** at 665. Mr. Wilbur, however, had been burdened with proving "heat of passion" by a preponderance of the evidence in order to mitigate the crime to manslaughter.[1] Under Maine law, the act

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[1] In relevant part, that statute read:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought... Me. Rev. Stat. Ann. Tit. 17 Section 2551 (1964).

of killing one "in the heat of passion, on sudden provocation" negated the intent element of the crime of murder.

Since heat of passion negated "intent" under the Maine statute, this Court held that the State was required to prove "beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case". Id. at 704.

Two things are evident from **Mullaney.** First, a state's interpretation of its own laws will be binding on this Court, absent "subterfuge". **See also Patterson, supra** at 691. Second, while the Court will begin its inquiry on the constitutionality of the burden-shifting issue by looking to the words of the statute, it will ultimately look to the

way in which the words are defined to determine whether there is an unconstitutional shifting of the burden of proof. This latter point is manifest since the fact that "heat of passion" negated intent did not appear on the face of the Maine statutes. Rather, this was determined by looking to the judicial gloss placed on intent and heat of passion by the Maine courts.

Patterson, supra, further amplified this analysis. In New York, the crime of second-degree murder was defined as requiring the state to prove "(1) intent to cause the death of another person; and (2) causing the death of such person or of a third person". **Patterson, supra**, at 198 [citing New York Penal Law Section 125.25]. New York law, however, provided that if the defendant carried the burden of proving that the killing

was done "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse", the charge could be mitigated to manslaughter in the first degree. **Id.** at 198-199. In its review of New York law, the Court determined that the affirmative defense established "a mental infirmity not arising to the level of insanity..." **Id.** at 206 [quoting from **People v. Patterson,** 39 N.Y.2d 288, 302, 347 N.E.2d 898 (1976)]. Since the burden of proving insanity could constitutionally be placed on the defendant [**see Leland v. Oregon,** 393 U.S. 790 (1952)] and the affirmative defenses did not "serve to negative any facts of the crime" which the state was required to prove to convict on murder, the burden allocation was permissible.

Based upon **Patterson** and **Mullaney, supra**, the analysis appropriate to this case is:

(1) identify the elements of the crime to be proven;

(2) consider whether the State of Ohio presume any element of the crime charged;

(3) determine the relationship of affirmative defense to the crime charged; and

(4) determine if the affirmative defense negates any fact the State must prove.

The relevance of this analysis to the case **sub judice** is quite direct. Here, the Ohio Supreme Court essentially held that burdening the defendant with proving the defense of self-defense passes constitutional muster for the following reasons:

(1) the State was required to prove all of the elements of the crime charged (purposely, prior calculation and design, causing death)[**State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986)];

(2) the United States Supreme Court's holding in **Patterson** did not require the State to disprove all affirmative defenses [Id. at 93];

(3) since self-defense contains facts which may be peculiarly within the defendant's knowledge, it would be too onerous to require the State to disprove those facts [Id. at 94]; and

(4) self-defense does not negate any elements of the offense

with which Ms. Martin was charged [**Id.**].

The first three grounds for the decision below are of little consequence. The mere fact that the jury is instructed that the State bears the burden of proof on all elements beyond a reasonable doubt merely brings the State in conformance with **In re Winship, supra.** Thus, this factor simply states the obvious. Second, this Court has never held that labeling a defense as an affirmative defense allows the State to burden the defendant with proving that defense. Certainly, such a proposition would elevate form over substance, a proposition soundly rejected in **Mullaney, supra,** at 699. This Court has never advocated a view of the law that would allow the use of labels to short circuit a functional

analysis. Third, the characterization of self-defense as a defense peculiarly within the knowledge of the defendant cannot justify placing the burden of proof on the defendant. That a fact may be within the knowledge of the defendant is insufficient to justify shifting the burden of proof to the defendant. **Mullaney, supra,** at 702. Even though the State may be required thereby to prove a "negative" of a fact likewise is of no consequence. **Id.** at 702, n. 31. The **Mullaney** Court soundly rejected this same rationale posited by the State of Maine:

> No doubt this is often a heavy burden for the prosecution . The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential. **Id.** at 701.

Since the first three rationales are of little significance, this Court must then consider whether the Ohio Supreme Court was correct when it held that self-defense negates no elements of the crime of aggravated murder. In beginning this inquiry, there can be no doubt that if the defense "serves to negative any facts of the crime which the State is required to prove", the defendant cannot be burdened with proving the defense. **Patterson** at 206-207. Stated differently, if the existence or nonexistence of the defense bears a necessary relationship to the elements of the crime, the State must carry the burden of negating the defense. **Mullaney, supra**, at 706 (J. Rehnquist, concurring).

Looking to the face of the statute, the common-law view of those elements

contained therein and the nature of self-defense, **Amicus** submits that self-defense negates various elements of the crime of aggravated murder.

Both the Federal courts, Devitt and Blackman, Federal Jury Practice and Instruction (3d ed. 1977) Section 41.19, and a "substantial majority of the States", **State v. Kirtley**, 252 S.E.2d 374, 380 (W. Va. 1978), require that once self-defense is properly placed in issue, the government must prove the defendant was guilty by proving that he did not act in self-defense. Indeed, it would appear that prior to **Mullaney v. Wilbur, supra**, there were--excluding Ohio--11 jurisdictions which attempted to make an accused bear the burden of proving self-defense by at least a pre-

ponderance of the evidence.[2] Since 1975, at least nine of those states [Delaware,[3] Georgia,[4] Kentucky,[5]

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[2]These jurisdictions were: Delaware; Georgia; Kentucky; Maryland; North Carolina; Pennsylvania; Rhode Island; South Carolina; Tennessee; Texas; and West Virginia. **See** Anno., "Homicide: Modern Status of Rules As To Burden and Quantum of Proof to Show Self-Defense", 43 A.L.R.3d 221, 226-227 (1972). This list includes only those states which placed a burden of proof (as opposed to a burden of going forward) upon the accused by at least a preponderance.

[3]**Hamilton v. State,** 343 A.2d 594 (Del. 1975)[recognizing statutory change].

[4]**See Henderson v. State,** 234 Ga. 827, 218 S.E.2d 612 (1975)[state admitted constitutional error in placing the burden of proof of self-defense on defendant].

[5]**See** Kentucky Revised Statutes, Section 503.050 (recognizing self-defense as justification) and Commentary to K.R.D. Section 503.020 [once the defendant raises the issue of justification, "the prosecution must bear the ultimate burden of persuading the jury that the defendant was not justified"].

Maryland,[6] North Carolina,[7] Pennsylvania,[8] Rhode Island,[9] Texas,[10] and West Virginia,[11]] have abandoned that approach and adopted the view that once self-defense is placed in issue, the burden is upon the state to prove that

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[6] **State v. Evans**, 362 A.2d 629 (Md. 1976)[after **Mullaney** could not constitutionally require defendant to bear burden of proof on self-defense as justification].

[7] **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975)[self-defense negates the unlawfulness element of murder], **rev'd on other grounds sub.nom. Hankerson v. North Carolina**, 432 U.S. 233 (1977).

[8] **Commonwealth v. Hilbert**, 382 A.2d 724 (Pa. 1978) [self-defense negates unlawfulness and malice].

[9] **In re Doe**, 120 R.I. 732, 390 A.2d 920 (1978) [self-defense negates unlawful-ness]. **Accord: State v. Baker**, 417 A.2d 906 (R.I. 1980).

[10] **Luck v. State**, 588 S.W.2d 371 (Tex. 1979), **cert. denied** 446 U.S. 994 (1980)[under Texas code state must disprove self-defense beyond a reasonable doubt].

[11] **State v. Kirtley, supra**, [once properly placed in issue, state must prove defendant did not act in self-defense--based upon state law and not due process].

the accused did not act in self-defense.

Amicus is unable to find any dispositive authority from Tennessee.[12] The remaining jurisdiction, South Carolina, continues to adhere to the position that there is no constitutional infirmity in requiring the accused to bear the burden of proof of self-defense,[13] but its instructions on this issue have recently been held unconstitutional by the Fourth Circuit.[14] Thus, it would appear that

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[12] **See, e.g., State v. Wilson**, 556 S.W.2d 232, 234 (Tenn. 1977)[defendant "must show" he acted in self-defense (no indication as to whether this involves a burden of persuasion or only a burden of production)].

[13] **See Thomas v. Leeke**, 547 F. Supp. 612 (D.S.C. 1982) and South Carolina state cases collected therein.

[14] **Thomas v. Leeke**, 725 F.2d 246 (4th Cir. 1984)[reversing the District Court on the grounds that the South Carolina instructions that the State bore the burden of proof on guilt and the defendant bore the burden of proof on self-defense was contradictory].

Ohio stands alone in its attempt to force the accused to prove innocence by proving self-defense.

It has long been accepted that an accused was presumed innocent; that the State was required to prove guilt beyond a reasonable doubt; and that the accused could not be required to prove innocence. Since **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring an accused to prove her innocence, and if one acting in lawful self-defense is innocent, then the State of Ohio cannot justify imposing the burden of proof upon self-defense upon Petitioner Martin. Moreover, since **Mullaney v. Wilbur, supra**, prohibits the State from making an accused prove a "defense" which would negate a single element of the crime, it necessarily follows that the State cannot justify

making the accused prove a "defense" which negates the entire crime.

On an "elements" analysis, breaking the crime of aggravated murder down into its sub-parts, the result is the same: self-defense negates a variety of elements. Those elements are:

1. Criminal Conduct--It is axiomatic that the State can only punish criminal conduct. **E.g., Robinson v. California**, 370 U.S. 660 (1962). As set forth above, killing another in self-defense is lawful conduct which establishes that no crime has been committed.

2. Criminal Intent--Ohio law requires that for an act to be criminal there must be a "blame-worthy" mental state: a "guilty state of mind". **See** Legislative Committee Comments to Ohio Revised Code Sections 2901.21 and

2901.22. This is consistent with federal constitutional requirements. **E.g., Powell v. Texas,** 392 U.S. 514 (1968); **Gay v. United States,** 408 F.2d 923 (8th Cir. 1969), **cert. denied** 396 U.S. 823 (1969).

A person who acts in lawful self-defense cannot be said to have a state of mind which is either "blame-worthy" or "guilty". Indeed, Ohio cases speaking to this issue have specifically held that proof of self-defense is inconsistent with the **mens rea** required to make one culpable of homicide. **State v. Clifton,** 32 Ohio App.2d 294, 286, 287, 290 N.E.2d 921 (1972); **State v. Robinson,** 48 Ohio App.2d 197, 206, 209, 356 N.E.2d 725, 731, 732 (1975)(Whiteside, concurring), **aff'd on other grounds,** 47 Ohio St.2d 103, 351 N.E.2d 88 (1976).

In this case, the State of Ohio was required to prove, in addition to "purpose", or **mens rea**, the elements of prior calculation and design. Under Ohio law, these elements go beyond the traditional common-law definition of premeditation and deliberation:

> Syllabus 2. Instantaneous deliberation is not sufficient to constitute 'prior calculation and design'.
>
> Syllabus 3. Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.
>
> **State v. Cotton**, 56 Ohio St.2d 8, 381 N.E.2d 186 (1978).

Since self-defense is an instinctive act and reflexive, a killing in self-defense

defense would negate the elements of prior calculation and design.

3. The Voluntary Act Requirement--Ohio Revised Code Section 2901.21(C) requires that acts be voluntary before criminal liability attaches. Actions taken in self-defense are based upon "the 'instinct' for self-preservation and arise 'spontaneously'". **Stoffer v. State**, 15 Ohio St. 47, 52-53 (1864), **overruled on other grounds, Meade, et al. McGraw**, 19 Ohio St. 55, 62 (1869).

> A legitimate act of self-defense is much more a mere reflex action than one committed voluntarily (emphasis added).
> **State v. Hardy**, 60 Ohio App.2d 325, 329, 397 N.E.2d 773, 776 (1978).

4. The Peace and Dignity Requirement--The Ohio Constitution requires that all indictments allege that the acts complained of were

"against the Peace and Dignity of the State of Ohio." Article IV, Section 20, Ohio Constitution. **See also,** Ohio Revised Code Section 2941.06. The "manifest object" of this requirement is to provide:

> [A] sufficient and uniform conclusion to the allegations of fact constituting the charge.
> **State v. Stapley,** 19 O.D. (N.P.) 110, 111 (Hamilton Cty. C.P. Ct. 1908)(emphasis added).

See also, State v. Nieto, 101 Ohio St. 409, 428, 130 N.E. 663 (1920)(Wanamaker, J., dissenting on other grounds).

Since action taken in self-defense is not illegal, it cannot be against the Peace and Dignity of the State of Ohio. Consequently, proof that the conduct was in self-defense would negate the Peace and Dignity element.

5. Unlawfulness--"By definition, the indictment for a criminal offense must therefore charge the general

allegations of unlawfulness of the conduct of the defendant in addition to the specific elements which constitute the criminal offense". **State v. Simon**, No. 6262 (2nd Dist. Ct. App., Jan. 6, 1980) at 13. This necessity for proving unlawfulness is preserved even where the language is not specifically mentioned in the statute. **State v. Stout**, 49 Ohio St. 270, 282-282, 30 N.E. 437 (1892). Moreover, the peace and dignity allegation required by the Ohio Constitution is itself a claim that the conduct was "unlawful". **Hamilton v. Alvis**, 109 Ohio App. 298, 301, 160 N.E.2d 372 (1959). **See State v. Nieto, supra. See also**, Revised Code Section 2941.10 [the fact of the indictment constitutes an allegation that no legal excuse exists for the act].

Ohio cases have uniformly recognized that proof of self-defense would negate the element of unlawfulness and utilized what is now an unconstitutional presumption to place the burden of proof of self-defense on the defendant. **E.g., Silvus v. State**, 22 Ohio St. 90 (1871); **State v. Robinson**, 161 Ohio St. 213, 118 N.E.2d 517 (1954); **State v. Kinnemore**, 34 Ohio App.2d 39, 295 N.E.2d 680 (1972). Indeed, the Ohio Supreme Court below characterized the affirmative defense of self-defense as a "justification for admitted conduct". **Martin**, 21 Ohio St.3d at 94. **See also, Thomas v. Arn**, 704 F.2d 865, 877 (6th Cir. 1983)("[Ohio's] use of the terms 'excuse' and 'justification' strongly implies that a criminal offense has been committed--i.e., that all elements of a

crime have been proved beyond a reasonable doubt and that the perpetrator will be criminally liable unless an 'excuse' or 'justification' for his conduct is presented"). **Amicus** submits that a plea of self-defense plainly denies, rather than admits, that the elements of a crime have been established. Thus, under Ohio law a lawful act of self-defense is presumed to be unlawful unless the accused establishes his innocence.

There also seems to be some confusion over the terms "excuse" and "justification". While the Ohio courts seem to use these terms interchangeably, at common law the terms carried very real definitional differences. **See Erwin v. State**, 29 Ohio St. 186 (1876).

Excusable homicide resulted in the forfeiture of goods, while justifiable homicide resulted in a complete acquittal free from any sort of forfeiture. **Erwin, supra,** at 195. A further distinction was that an excusable homicide would be found where no actual danger existed. Justifiable homicide, on the other hand, would be found where actual danger was present. **Erwin, supra,** at 198-199. A finding of "justified" homicide, however, constituted a finding that the act of self-defense was lawful.

However, to the extent this type of "elements analysis is used, those arguing for the constitutionality of Ohio's statutory scheme find themselves in conflict with the judgment of the

Fourth Circuit examining Maryland law;[15] the Fourth Circuit examining North Carolina law;[16] the Fourth Circuit examining South Carolina law;[17] the Fifth Circuit examining Georgia law;[18]

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[15] **Guthrie v. Warden**, 683 F.2d 820 (4th Cir. 1982)[Maryland law: self-defense exonerates an accused of any degree of culpable homicide].

[16] **Wynn v. Mahoney**, 600 F.2d 448 (4th Cir.), **cert. denied** 444 U.S. 950 (1979)[North Carolina law: self-defense negates unlawfulness].

[17] **Sarah Thomas v. William D. Leeke**, 725 F.2d 246 (4th Cir. 1983). Though the decision in this case is based upon a finding of confusion between the instructions upon the state's burden to prove guilt beyond a reasonable doubt and the defendant's burden to prove self defense, it is clear that the underlying problem was that the Court found self-defense to be inconsistent with guilt.

[18] **Tennon v. Ricketts**, 642 F.2d 161 (5th Cir. 1981)[Geogia law: self-defense negates unlawfulness]; **Holloway v. McElroy**, 632 F.2d 605 (5th Cir. 1980), **cert. denied** 451 U.S. 1028 (1981)[Georgia law: self-defense negates unlawfulness].

and the Eleventh Circuit examining Georgia law.[19]

The only Circuit cases which would arguably contradict this position involve the law of Virginia where the defendant has the burden of production (not the burden of proof) to raise a reasonable doubt as to self defense.[20] The only Federal authority which is directly contrary is based upon South Carolina law. **See Thomas v. Leeke**, 547 F. Supp. 612 (D.S.C. 1982), and South

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[19] **See Lamb v. Jernigan** , 683 F.2d 1332, 1336 (11th Cir. 1982), **cert. denied** 460 U.S. 1024 (1983)[Georgia law: self-defense negates malice](**dicta**).

[20] **Frazier v. Weatherholtz**, 572 F.2d 994, 995 (4th Cir. 1978), **cert. denied** 439 U.S. 876 (1978)[Virginia law: no infirmity in requiring defendant to establish self-defense "to the extent of raising...a reasonable doubt as to whether or not he acted in the lawful exercise of such right"]; **Baker v. Muncy**, 619 F.2d 327 (4th Cir. 1980)[Virginia law: following **Frazier**].

Carolina state decisions cited therein. That opinion, however, was reversed by the Fourth Circuit, 725 F.2d 246 (4th Cir. 1984), using an analysis identical to that utilized by Judge Jones in his dissent in **Cherry v. Jago**, 722 F.2d 1296 (6th Cir. 1983), **cert. denied** ___U.S.___, 104 S.Ct. 3518 (1984).

It is therefore noteworthy that in **Sarah Thomas v. William D. Leeke**, 725 F.2d 246 (4th Cir. 1984), the Fourth Circuit has recently considered instructions that are analogous to those given in Petitioner Martin's case, and concluded that due process is violated because there are inherent contradictions between the trial court's instructions that the State must bear the burden of proof beyond a reasonable doubt and that the defendant must bear the burden of proof by a preponderance

on self-defense. It appears that the Fourth Circuit's decision is predicated upon the very rationale advanced by Judge Jones in his dissent in **Cherry v. Jago, supra.** Thus, the Ohio Supreme Court's decision in Petitioner's case is in direct conflict with the decisions of most other courts on this fundamental constitutional question.

CONCLUSION

For the reasons stated above and those contained in Petitioner Martin's Petition for Writ of Certiorari, **Amicus** prays that this Court grant certiorari and find that Ohio's burdening the defendant with proving self-defense is unconstitutional.

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of March, 1986, three copies of the foregoing Brief For Ohio Public Defender Commission As **Amicus Curiae** In Support Of Petitioner were mailed, first-class postage prepaid, to James R. Willis, Esq., Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to John T. Corrigan, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State

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Counsel for **Amicus Curiae**

MOTION FILED
JUL 11 1986

No. 85-6461

In The Supreme Court Of The United States

OCTOBER TERM, 1985

EARLINE MARTIN, Petitioner,

vs.

STATE OF OHIO, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR OHIO PUBLIC DEFENDER COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Ohio Public Defender Commission hereby respectfully moves for leave to file the attached brief **amicus curiae** in support of Petitioner in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

The interest of the Ohio Public Defender Commission in this case arises from the fact that it and other appointed counsel in Ohio represent many criminal defendants similarly

situated to Petitioner. The issue raised by Petitioner of concern to **Amicus** is Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of evidence. **Amicus** represents the interests of a large number of Ohio attorneys who believe that Ohio law on this issue is in conflict with the Due Process Clause of the Fourteenth Amendment.

In the instant case, **Amicus** believes the resolution of this issue will depend on whether this Court finds that self-defense negates any facts necessary to prove the crime of aggravated murder under Ohio law. **See Patterson v. New York**, 432 U.S. 197, 206-207 (1977). While Petitioner's argument broadly addresses this issue, **Amicus** believes that the brief it is requesting permission to file contains a more detailed analysis of the pertinent elements of Ohio law and their relationship to self-defense. Additionally, the brief **amicus curiae** contains a discussion

of where the federal courts and other states stand on this issue, not contained in Petitioner's brief.

For these reasons, **Amicus** requests leave to file the attached brief **amicus curiae** in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Motion for Leave to File Brief **Amicus Curiae** and Brief **Amicus Curiae** were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
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INTEREST OF AMICUS CURIAE

The Ohio Public Defender Commission was created by Ohio law in 1976. Its purpose is to provide, supervise and coordinate legal representation at state expense for indigent and other persons. Ohio Revised Code § 120.01. One of its primary responsibilities is to provide legal representation to criminal defendants in felony trials, appeals and post-conviction matters. Additionally, the Commission provides technical aid and assistance in criminal cases to county public defenders and appointed counsel throughout the State of Ohio. As a result, the Commission is concerned with the case at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants. Petitioner's written consent to the Commission's filing a brief **amicus curiae** in support of Petitioner has been filed with the Clerk's office. Respondent's consent was requested but refused.

The Commission has represented clients in criminal cases before this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Northern and Southern Districts of Ohio. The Commission has also filed **amicus** briefs in various Ohio courts in other actions which involved the rights of criminal defendants.

The resolution of the issue in this case will directly affect how Commission attorneys and other members of the criminal defense bar in Ohio handle cases involving the issue of self-defense. Also, other Ohio defendants, similarly situated to Petitioner, are being represented by Commission attorneys and will be directly affected by the outcome.

SUMMARY OF ARGUMENT

Amicus submits that the decision below is erroneous for three primary reasons. First, the defense of self-defense establishes that the actor was engaged in lawful,

innocent behavior. Since **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring a defendant to prove her innocence, the State of Ohio is barred from burdening her with proving self-defense.

Second, under an elements analysis stemming from **Mullaney v. Wilbur**, 421 U.S. 684 (1975), and **Patterson v. New York**, 432 U.S. 197 (1977), self-defense negates several elements of the crime of aggravated murder: (1) unlawfulness; (2) "peace and dignity" requirement of the Ohio Constitution [Article IV, § 20 and Revised Code § 2941.06]; (3) criminal conduct; (4) the voluntary act requirement [**see** Revised Code § 2901.21(C)]; and (5) criminal intent (purposely, with prior calculation and design) [**see** Revised Code § 2903.01(A)].

Third, due process requires that the State bear the burden of proving beyond a reasonable doubt that the accused's actions were unlawful and not in self-defense.

ARGUMENT

I.

SINCE SELF-DEFENSE IS CONSTITUTIONALLY PROTECTED INNOCENT CONDUCT, AN ACCUSED CANNOT BE REQUIRED TO BEAR THE BURDEN OF PROOF ON THAT ISSUE.

The State of Ohio cannot make self-defense a crime. Any such attempt by the State violates both its own Constitution[1] and several provisions of the Federal Constitution.

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1. Article I, Section 1 of the Ohio Constitution provides, in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . . and obtaining . . . safety" (emphasis added).

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense and security . . ." (emphasis added).
>
> This latter provision is "intended to . . . afford the citizen [a] means for his defense of self and property." **State v. Hogan**, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900).

First, a command by the state that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd.

> ". . . the law cannot prevent [self-defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat." O. W. Holmes, Jr., The Common Law 47 (1881).

For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[2]

Second, to punish one whose only "crime" was to save her own life when attacked by a wrongdoer would be violative of the cruel and

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2. In **State v. Hardy**, 60 Ohio App.2d 325, 329, 397 N.E.2d 773, 776 (1978), the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, . . . without due process of law. Obviously, the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

unusual punishment provision of the Eighth Amendment.[3] Equally as important, any attempt to deprive the people of the "right" of self-defense by making self-defense criminal would deny them constitutional rights reserved and protected by substantive due process under the Fourteenth Amendment and the rights reserved to the people under the Ninth Amendment.

With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." **Snyder v. Massachusetts**, 291 U.S. 97, 105 (1934), **quoted**

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3. The Eighth Amendment prohibits cruel and unusual punishment--including punishment that is disproportionate to the "offense." **Coker v. Georgia**, 433 U.S. 584 (1977). Punishment for <u>any</u> lawful act, including self-defense, is both disproportionate and cruel and unusual. **See also Holloway v. McElroy**, 632 F.2d 605, 627, n. 35, and 636, n. 49, **cert. denied**, 451 U.S. 1028 (1981), noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

with approval, Patterson v. New York, 432 U.S. 197, 201-202 (1977). It should not be open to question that self-defense is such a right. As Judge Murnaghan wrote in **Griffin v. Martin**, 785 F.2d 1172, 1180, n. 24 (4th Cir. 1986) (pending following rehearing **en banc**):

> ". . . Since a time before the formation of our nation, and hence the existence of a Due Process Clause . . . a homicide committed in self-defense simply has been no crime."

At least since the sixteenth century, a homicide which resulted from an act done in self-defense was justifiable and not unlawful. **Mullaney v. Wilbur**, 421 U. S. 684, 692

(1975).[4] It was (and is) "lawful and justifiable to resist certain attacks, even by the death of the assailant, and the party [was] without blame." East, Treatise of the Pleas of the Crown 217 (1803).

When courts and commentators alike speak of self-defense, they speak in terms of the "right of self-defense." This phrase is not accidental, for the roots of self-defense run deep within American common law, finding its seeds in English common law. Blackstone described three primary and overriding rights

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4. Wharton's Criminal Evidence, § 224, 479 (13th ed. 1972); I, Warren on Homicide § 54, at 162 (1914); I, Warren, **supra**, at 163:

> "Criminal homicide is the unlawful killing of a human being . . ." (footnote omitted) (emphasis added). **See also** §§ 63, 64, 68.

I, Warren, **supra**, § 143, at 617; 27 Ohio Jur. 2d, Homicide, § 89, at 629 (1957):

> "It is universally recognized that one is not punishable criminally for taking the life of another person when he has been put under the necessity or apparent necessity of doing so, without any fault on his own part in order . . ."

retained by individuals "which [are] not required to be sacrificed to public convenience." 1 Blackstone, Commentaries on the Laws of England, Ch. 1, p. 129 (1783). These three rights are "the right of personal security; the right of personal liberty; and the right of private property." **Id.**

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation . . . For whatever is done by a man, to save life or member is looked upon as done upon the highest necessity and compulsion." **Id.**, at 129-130.

Even under the tyrannical reign of slavery it was acknowledged that the slave had the right to act in self-defense in order to preserve his own life.[5] Congressman John A. Bingham, author of Section I of the

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5. **State v. Will**, 18 N.C. 131, 171 (1834).

Fourteenth Amendment, treated self-defense as "the acknowledged right of man . . ."[6]

This right was also recognized in early Federal case law.

> "Where crime is committed with impunity . . . those unprotected by other sanctions . . . [are compelled] . . . to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security." **United States v. Rhodes**, 27 Fed. Cas. 785 (Cir. Ct. Ky. 1866).[7]

The right to defend one's self is a basic fundamental right rooted in such basic documents as the Declaration of Independence, stating: "that all men are endowed by their creator with certain inalienable rights . . .

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6. John A. Bingham, The Argument of John A. Bingham, Special Judge Advocate (Washington 1865) 13-14, quoted in Allen, "A Rhetorical Analysis of the Speaking of John A. Bingham with Emphasis on His Role in the Trial of the Lincoln Conspirators" (Ph.D Dissertation, Ohio State University 1963).

7. **See also Wallace v. United States**, 162 U.S. 446 (1896); **Beard v. United States**, 158 U.S. 550, 563 (1895); **Thompson v. United States**, 155 U.S. 271, 283 (1894); **Gourke v. United States**, 153 U.S. 183 (1893); and **Allen v. United States**, 164 U.S. 492 (1894).

among these are life." As recognized by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.'" **Reed v. State**, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Thus, the right of lawful self-defense has been recognized as an "inalienable right," **Id.**, at 517.[8]

In **United States v. Morris**, 125 F. 322 (E.D. Ark. 1903), Judge Trieber held that the right to lease land was a fundamental and inalienable right of every freedman. Can it be doubted that the right to defend one's own life is at least as "fundamental" and "inalienable" as the right to lease land for farming purposes?

> ". . . some truths are indeed self-evident. When a killing is, by

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8. **See also** I, Warren on Homicide, § 148, p. 639.

> reason of self-defense, rightful, not wrongful, i.e., is lawful, there is no crime." **Griffin v. Martin**, 785 F.2d 1183 (Murnaghan, J.) (pending following rehearing **en banc**).

The Ninth Amendment also recognizes that:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." **Griswold v. Connecticut**, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

The right to privacy recognized in **Griswold** would be a hollow guarantee if, in a time of necessity, a person could not defend herself from unlawful attacks without subjecting herself to criminal prosecution. This would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," **Boyd v. United States**, 116 U.S. 616, 630 (1886), and would surely sweep too broadly into an area of constitutionally protected freedom.

Ultimately, the right of self-defense:

> "reflects a fundamental societal perception that in a situation where one person must die, it is preferable that the innocent party, the non-aggressor, survive." Note, "The Constitutionality of Affirmative Defenses After Patterson v. New York," 78 Col. L. Rev. 655, 672 (1978).[9]

Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." **Stoffer v. State**, 15 Ohio St. 47, 53 (1864). It was for reasons such as these that Sixth Circuit Judge Merritt has properly concluded that:

> ". . . the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law, and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists." **Isaac v. Engle**, 646 F.2d 1129, 1140 (6th Cir. 1980) (dissent), **rev'd on other grounds sub nom, Engle v. Isaac**, 456 U.S. 107 (1982).

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9. **See also** Wechsler & Michael, "A Rationale of the Law of Homicide," 37 Columbia L. Rev. 701, 736 (May 1937).

As stated by the Fourth Circuit:

> ". . . it is elementary and fundamental to our jurisprudence that killing or wounding in self-defense is simply no crime at all." **Sarah Thomas v. William D. Leeke**, 725 F.2d 246, 250, n. 2 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.E.2d 148 (1984).

Because self-defense is a constitutionally protected right, one exercising that right is engaged in innocent conduct. To require an accused to bear the burden of proof upon the issue of self-defense is to require the accused to prove her innocence in violation of the principles enunciated in **In re Winship**.

II.

PROOF OF SELF-DEFENSE NECESSARILY NEGATES SEVERAL INGREDIENTS OF THE CRIME OF AGGRAVATED MURDER.

A. Mullaney and Patterson Analysis

Based upon **Patterson** and **Mullaney**, the analysis appropriate to this case is:

(1) identify the elements of the crime to be proven;

(2) consider whether the State of Ohio presumes any element of the crime charged;

(3) determine the relationship of affirmative defense to the crime charged; and

(4) determine if the affirmative defense negates any fact the State must prove.

The relevance of this analysis to the case **sub judice** is quite direct. Here, the Ohio Supreme Court essentially held that burdening the defendant with proving the defense of self-defense passes constitutional muster for the following reasons:

(1) the State was required to prove all of the statutory elements of the crime charged (purposely, prior calculation and design, causing death) [**State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986)];

(2) this Court's holding in **Patterson** did not require the State to disprove all affirmative defenses [**id.**, at 93];

(3) since self-defense contains facts which may be peculiarly within the defendant's knowledge, it would be too onerous to require the State to disprove those facts [**id.**, at 94]; and

(4) self-defense does not negate any elements of the offense with which Ms. Martin was charged [**id.**].

The first three grounds for the decision below are of little consequence. The mere fact that the jury is instructed that the State bears the burden of proof on all elements beyond a reasonable doubt merely brings the State in conformance with **In re Winship**. Thus, this factor simply states the obvious. Second, this Court has never held that labeling a defense as an affirmative defense allows the State to burden the defendant with proving that defense. Certainly, such a proposition would elevate form over substance, a proposition soundly rejected in **Mullaney v. Wilbur**, 421 U.S. at 699. This Court has never adopted a view of the law that would allow the use of labels to circumvent a functional analysis. Third, the characterization of self-defense as a defense peculiarly within the knowledge of the defendant cannot justify placing the burden

of proof on the defendant. That a fact may be within the knowledge of the defendant is insufficient to justify shifting the burden of proof to the defendant. **Mullaney v. Wilbur**, 421 U.S. at 702. Even though the State may be required thereby to prove a "negative" of a fact likewise is of no consequence. **Id.**, at 702, n. 31. The **Mullaney** Court soundly rejected this same rationale posited by the State of Maine:

> "No doubt this is often a heavy burden for the prosecution. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." **Id.**, at 701.

Since the first three rationales are of little significance, this Court should consider whether the Ohio Supreme Court was correct when it held that self-defense negates no elements of the crime of aggravated murder.

While this Court must initially look to the words of the statute in question to

determine whether self-defense negates any of its elements, this Court's decisions in **Mullaney** and **Patterson** also establish that the way in which those terms are interpreted by the courts of the state is of importance.

For example, in **Mullaney**, the defendant was charged with murder.[10] The defendant claimed first that he lacked the criminal intent necessary for the crime and second that the killing occurred in the "heat of passon," thereby reducing the crime to manslaughter. **Id.**, at 685. The defendant was burdened with proving that the killing occurred in the heat of passion on sudden provocation to mitigate the murder charge to manslaughter. **Id.**, at 687. **See also** Me. Rev. Stat. Ann. Tit. 17 § 2551 (1964). Had this Court only looked to the face of the

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10. Me. Rev. Stat. Ann. Tit. 17, § 2651 (1964); **Mullaney v. Wilbur**, 421 U.S. at 686, n. 3: "whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

Maine murder statute, "heat of passion" would have borne no relationship to any of the elements required to be proven. This Court, however, looked to Maine case law to determine a more accurate view of the criminal intent required for a murder conviction. In **State v. Lafferty**, 309 A.2d 647 (Me. 1973), the Maine Supreme Court held that malice aforethought was not an element of murder, disputing an interpretation of Maine law made by the Court of Appeals for the First Circuit in originally granting the Writ of Habeas Corpus. Rather, **Lafferty** held that a killing is unlawful and constitutes murder upon proof "of any deliberate, cruel act, committed by one person against another, suddenly without any, or without a considerable provocation." **State v. Lafferty**, 309 A.2d at 665.

Since absence of "heat of passion" was to be proven by the State, this Court held that the defendant could not be burdened with proving that factor. While proof of heat of

passion merely reduced the degree of culpability, the Court nonetheless held that the State could not burden the defendant with proving "heat of passion." In reaching this crucial result, the Court relied heavily upon the state court's interpretation of its own statutes.

A similar approach was taken in **Patterson** where the defendant was charged with murder in the second degree.[11] The defendant admitted the killing but defended on the ground that he killed during an extreme emotional disturbance. That defense mitigated the crime to manslaughter in the first degree. In finding that the defendant could be burdened with proving this defense, this Court looked to New York case law. Based upon that review, the Court held that "extreme emotional disturbance" did not "serve to

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11. New York Penal Law, § 125.25 (McKinney 1975); **Patterson v. New York**, 432 U.S. at 198, n. 2: "with intent to cause the death of another person, he caused the death of such person . . . ."

negative any facts of the crime which the State is to prove in order to convict of murder." **Id.**, at 207.

Under New York law, extreme emotional disturbance was defined as a "mental infirmity not arising to the level of insanity." **Patterson v. New York**, 432 U.S. at 206, **citing People v. Patterson**, 39 N.Y.2d 288, 302; 347 N.E.2d 898, 383 N.Y.S.2d 573, 582 (1976). Since this Court's prior decisions in **Leland v. Oregon**, 343 U.S. 790 (1952), and **Rivera v. Delaware**, 429 U.S. 877 (1976), unequivocally allowed the State to burden the defendant with proving insanity, New York did no more in **Patterson** than it was constitutionally permitted to do. This Court distinguished the result in **Patterson** from that in **Mullaney** primarily upon the way in which Maine had defined, in case law, the necessary elements of murder. Since, under Maine law, the absence of provocation was an element of the crime, the State could not

burden the defendant with proving that defense. An opposite result was reached in **Patterson** because under New York law, extreme emotional disturbance, both on the face of the statute and by judicial interpretation, bore no relationship to any of the elements charged.

Thus, **Mullaney** and **Patterson** indicate that this Court should consider not only the words contained in the homicide statute, but also the case law which gives definition and content to the proscribed offense. At the same time, both **Mullaney** and **Patterson** demonstrate that the ultimate conclusion as to whether a given defense necessarily negates an ingredient of the crime which the State is required to prove is a matter of federal law upon which this Court must exercise an independent judgment. As articulated by the Fourth Circuit:

> "The labels attached by the state legislature or supreme court are

> not dispositive . . . and the federal courts are to employ a 'functional analysis' aimed at determining whether the state has in effect incorporated the absence of the affirmative defense into the elements of the crime."[12]

Indeed, as this Court recognized in **McMillan v. Pennsylvania**, ___ U.S. ___, 54 U.S.L.W. 4709, 4711 (1986): ". . . in certain limited circumstances **Winship**'s reasonable doubt requirement applies to facts not formally identified as elements of the offense charged."

B. Self-Defense Negates Unlawfulness

By definition, an act must be "unlawful" in order to justify the imposition of criminal sanctions:

> "It should be conceded, as an axiomatic proposition that an

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12. **Cooper v. North Carolina**, 702 F.2d 481, 484 (4th Cir. 1983) [citations omitted]. **Accord: Adkins v. Bordenkircher**, 674 F.2d 279, 282 n. 6 (4th Cir. 1982). **See also Lamb v. Jernigan**, 683 F.2d 1332, 1335-1336 (11th Cir. 1982), and **Holloway v. McElroy**, 632 F.2d 605, 625, 628 (4th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981).

> indictment or information must, in some manner, charge the unlawfulness of the defendant's conduct." Anno., 169 A.L.R. 166 (1947).

Thus, the mere allegation that a crime has been committed is an allegation of unlawfulness.

Historically, criminal homicide has been defined as the "unlawful killing of a human being . . ." I Warren on Homicide, § 54, p. 163 (1914). **See also** §§ 63, 64 and 68.

A review of Ohio law demonstrates that the element of "unlawfulness" has never appeared in the Ohio first-degree murder

statute.[13] Yet, Ohio cases have consistently required proof of unlawfulness in order to

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13. Prior to 1880, the statute read as follows:

> "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, . . . or by administering poison or causing the same to be done, kill another . . . ." Revised Statutes of 1854, 269; **State v. Farmer**, 156 Ohio St. 214, 218, 102 N.E.2d 11, 14 (1951); **see also Robbins v. State**, 8 Ohio St. 131, 175 (1857).

The statute was changed in 1880:

> "Whoever, purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another . . . ." **See** General Code § 12400.

The statute was next changed in 1953:

> "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." R.C. § 2901.01 (Page's 1953), Ohio Revised Code.

The statute reached its present state in 1974, where two elements (deliberate and premeditated malice) were replaced and the so-called "felony murder" aspect was given its own subsection:

> "(A) No person shall purposely, and with prior calculation and design, cause the

establish the crime of murder.[14]

From the above, it is evident this

(cont.)

death of another.

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape." Ohio Revised Code § 2903.01 (Page's 1974).

Ms. Martin was charged with violating R.C. § 2903.01(A).

14. In **Ohio v. Brooks**, 1 Ohio Dec. Reprint 407 (Cuy. Co. Common Pleas 1851), the court instructed the jury as follows in a case of first-degree murder:

> "[First], murder in the first degree, which in general is an unlawful killing purposely and of premeditated malice." **Id.** at 407 (emphasis added).

For a civil case that defines murder as an unlawful killing, **see Filmore v. Insurance Co.**, 82 Ohio St. 208, 214, 92 N.E. 26 (1910).

Likewise, Ohio courts have held:

> "The defendant in a homicide case cannot be required to establish his defense of self-defense until the State has established that the killing by him was an unlawful killing . . ." **Taylor v. State**,

judicial element of unlawfulness co-existed with the element of malice. Prior to 1974, when the element of malice existed, reviewing courts consistently interpreted the two terms differently and interpreted each to be required. Thus, the presence or absence of "malice" in the relevant statute has no effect on the requirement of "unlawfulness." The

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(cont.)

> 21 Ohio C.C. Dec. 602, syllabus 2 (1909) (emphasis added). **See also Wray v. State**, 5 Ohio C.C. (N.S.) 437, 442 (1904) (emphasis added).
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> "Murder in the first degree, he said, is the intentional unlawful killing, by one reasonable being of another, in the peace of the state, of deliberate and premeditated malice" (emphasis added). **State v. James Turner**, Wright (Ohio Supreme Court Decisions) 20, 27 (1831), **questioned Fuller v. State**, 12 Ohio St. 431, 436 (1861).
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> "If the 'intent to kill,' under all the circumstances of the transaction was justifiable and lawful, for example, if in lawful self-defense, the legislature could not be held reasonably to intend to declare it an offense. It is only where the intent to kill was unlawful and wrongful that it should be held to constitute a crime . . . ." **State v. Stout**, 49 Ohio St. 270, 283-284, 30 N.E. 437, 440 (1892) (emphasis added).

unlawfulness of the criminal act must always be proven. Ohio courts have likewise held that all Ohio citizens have a right to self-defense which, if established, is a lawful justifiable act.[15]

Furthermore, the Ohio Constitution requires that all indictments allege that the offense in question was against the "peace and dignity of the State of Ohio." Article IV, § 20, Ohio Constitution.[16] This is not a mere matter of form but rather a "clear allegation that the acts done were unlawful." **Hamilton v. Alvis**, 109 Ohio App. 298, 301, 160 N.E.2d 372, 374 (1959). The purpose of the requirement was to provide:

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15. **Marts v. State**, 26 Ohio St. 162, syllabus 2 (1875); **State v. Champion**, 109 Ohio St. 281, 284, 142 N.E. 141, 142 (1924); **see also Graham v. State of Ohio**, 98 Ohio St. 77, 81-82, 120 N.E. 232, 233 (1918) ["lawful right of self-defense"]; **State v. Vancak**, 90 Ohio St. 211, 214, 107 N.E. 511, 512 (1914); **Stoffer v. State**, 15 Ohio St. at 51-52.

16. **See also** R.C. § 2941.06 and R.C. § 2941.10 (the fact of the indictment constitutes an allegation that no legal excuse exists for the act).

> "[A] sufficient and uniform conclusion to the allegations of fact constituting the charge." **State v. Stapely**, 19 Ohio Dec. 110, 111 (Hamilton Cty. Common Pleas Ct. 1908) (emphasis added). **See also State v. Nieto**, 101 Ohio St. 409, 428, 130 N.E. 663, 668 (1920) (Wanamaker, J., dissenting on other grounds).

In the case at bar, the indictment against Petitioner Martin contains the specific allegation that her conduct was "unlawful" and against the "Peace and Dignity of the State of Ohio" (A. 23).

The instructions given in the case at bar paralleled this common-law view and required the jury to find that:

> "the defendant unlawfully and purposely and with prior calculation and design, caused the death of another . . ." (emphasis added) (Transcript at 686, A. 13).

Thus, the State must necessarily admit that it was required to prove, beyond a reasonable doubt, that the accused's conduct was unlawful.

The relevant question, then, becomes whether self-defense is inconsistent with

unlawful conduct. The case law of Ohio uniformly recognizes that proof of self-defense is proof of innocence and hence inconsistent with guilt. **E.g., Silvus v. State**, 22 Ohio St. 90 (1871), **cited with approval in State v. Humphries**, 51 Ohio St. 2d 95, 98, 364 N.E.2d 1354, 1357 (1977).[17]

In his dissent, Judge Jackson of the Eighth District Court of Appeals indicated that: "Historically, self-defense has been considered to negate the unlawfulness element" (A. 16) (citations omitted). As Justice

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17. In English common law, a distinction was made between justifiable and excusable homicide. Blackstone, Commentaries on the Laws of England 177-178 (1783). Justifiable homicide carried no penalties, while excusable homicides resulted in the forfeiture of the slayer's lands. The concept of forfeiture, being foreign to American law, was discarded and the distinction between justifiable and excusable self-defense, however slight originally, disappeared. I Bishop, A Treatise on Criminal Law, § 865, 2, p. 614 (9th ed. 1982); II Bishop, **supra**, § 617, 2, p. 471; **Erwin v. State**, 29 Ohio St. 186 (1876). Under Ohio law, all actions taken in self-defense are justifiable, lawful acts done without criminal intent. **E.g., Erwin v. State, supra**, at 194-199. **See also** LaFave & Scott, Handbook on Criminal Law, § 53 at 391 (1972).

Clifford F. Brown, of the Ohio Supreme Court, noted in his dissent:

> "For more than a century, self-defense has been considered to negate the element of unlawfulness which must be present in order to convict a defendant of aggravated murder." **State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 171 (1986) (citations omitted) (A. 45).

The decisions of other state and federal courts considering this issue have consistently found self-defense to be inconsistent with unlawfulness.[18]

> "Self defense annihilates unlawfulness and malice and consequently absence of it must be proven by the prosecution beyond a reasonable doubt." **Griffin v. Martin** 785 F.2d at 1182 (Murnaghan, J.) (pending following rehearing

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18. **E.g., McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028, (1981); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975), **rev'd on other grounds sub nom. Hankerson v. North Carolina**, 432 U.S. 233 (1977); **Commonwealth v. Hilbert**, 476 Pa. 288, 300, 382 A.2d 724, 731 (Pa. 1978). **See also** cases outlined in the Appendix to this Brief at A-1.

en banc).[19]

Indeed, the jury instructions in this very case inferentially indicated the inconsistency: if the accused was found to have acted in self-defense, then no crime was committed and a verdict of not guilty was to be returned.

In Ohio Revised Code § 2901.05(A), Ohio has adopted its common-law rule requiring an accused to bear the burden of proving a claim of self-defense. This rule was justified by Ohio courts at common law, however, because every killing was presumed to be unlawful. **See Silvus v. State**, 22 Ohio St. 90 (1871); **State v. Robinson**, 161 Ohio St. 213 (1954); **State v. Kinnemore**, 34 Ohio App.2d 39 (1972).

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19. **See also White v. Arn**, 788 F.2d 338, 347, n. 14 (6th Cir. 1986) (Petition for Writ of Certiorari pending):

> "[i]f unlawfulness were a statutory element of crimes in Ohio, then self-defense would negate the element and consequently the burden of proof could not be placed upon the accused" (emphasis added).

This common-law presumption of unlawfulness is still a part of Ohio law. This is evident from the Ohio Supreme Court's decision in this case. The Court characterized the affirmative defense of self-defense as a "justification for admitted conduct" which "seeks to relieve the defendant from culpability rather than negate an element of the offense charged." **Martin**, 21 Ohio St.2d at 94. **See also Thomas v. Arn**, 704 F.2d 865, 877 (6th Cir. 1983).[20]

Thus, under Ohio law, unlawfulness (i.e., a crime) is to be presumed from proof of the elements of the offense, despite the fact that the accused may have acted in self-defense. In other words, a lawful act of self-defense is presumed to be unlawful unless

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20. "[Ohio Revised Code § 2901.05(C)(2)'s] use of the terms 'excuse' and 'justification' strongly implies that a criminal offense has been committed--i.e., that all elements of a crime have been proven beyond a reasonable doubt and that the perpetrator will be criminally liable unless an 'excuse' or 'justification' is presented." **But see** fn. 17, **supra**.

the accused establishes his innocence. **See** Note, "H. B. 1168: The Burden of Proving An Affirmative Defense," 5 U. Dayton L. Rev. 441, 458 (1980).

At the same time, Ohio's high court refuses to acknowledge that self-defense is inconsistent with the fact that a crime (unlawfulness) has occurred. **See State v. Martin**, 21 Ohio St.3d at 94 ("The elements of the crime and the existence of self-defense are separate issues"). Indeed, a plea of self-defense plainly denies, rather than admits, that a crime has occurred.

Amicus submits that the State of Ohio cannot have it both ways. Either self-defense negates the elements of the crime (i.e., unlawfulness), as it did at common law, or it does not. If it does, the State's burden is clear. **See Patterson v. New York**, 432 U.S. 197 (1977). If it does not, then the State should not get the benefit of the common-law presumption of unlawfulness (i.e., that

a crime has been committed) from the fact that a killing has occurred; and thereby shift the burden of proof to the accused to prove otherwise. **See Patterson**, 432 U.S. at 215;[21] **accord, Mullaney v. Wilbur**, 421 U.S. 684 (1975).[22]

Moreover, Ohio's utilization of this presumption of unlawfulness violates traditional due process requirements for presumptions. It satisfies neither the rational connection test, i.e., the presumed fact must more likely than not flow from the proven fact, **Leary v. United States**, 395 U.S. 6, 36 (1969); or the beyond a reasonable doubt test, i.e., proven fact must be sufficient to support inference of presumed fact beyond a reasonable doubt, **Barnes v. United States**,

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21. "[The State] may not shift burden of proof to the defendant by presuming [an] ingredient of the offense upon proof of the other elements [of the offense]."

22. Presumption of malice from proof of an unlawful and intentional killing, unless accused proved he acted in heat of passion, is unconstitutional.

412 U.S. 837, 843 (1973).[23] See **Mullaney**, 421 U.S. at 702, n. 31. There is simply no basis in either logic or experience to infer that an accused acted unlawfully from mere proof of a killing. **See** Model Penal Code, Comment to Section 1.13 (Tent. Draft No. 4, 1955) ("No one can estimate the probability" that "an intentional homicide . . . was or was not committed in self-defense"). Therefore, Ohio's continued reliance upon this common-law presumption of unlawfulness to shift the burden to the accused to prove her act lawful violates due process.

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23. **Amicus** submits that Ohio's presumption of unlawfulness must satisfy the beyond a reasonable doubt test as it is a mandatory presumption. **See Francis v. Franklin**, 471 U.S. ___, 85 L.Ed.2d 344, 353 (1985) (mandatory presumption is one jury must infer if state proves certain predicate facts); **accord, Sandstrom v. Montana**, 442 U.S. 510 (1979). Ohio's presumption of unlawfulness is mandatory because it is established upon proof of the elements of the offense even though the defendant may have acted lawfully in self-defense.

C. **Self-Defense Negates Criminal Conduct**

It is axiomatic that the State can only punish criminal conduct. **E.g., Robinson v. California**, 370 U.S. 660 (1962); **Powell v. Texas**, 392 U.S. 514 (1968). It has been held since the 1600s that killing another in self-defense is conduct which is justified--no crime has been committed. **Mullaney v. Wilbur**, 421 U.S. at 692. This has always been the law in Ohio. **E.g., Marts v. State**, 26 Ohio St. 162 (1875) (Syllabus 2), **cited with approval, State v. Melchior**, 56 Ohio St.2d 15, 21, 381 N.E.2d 195, 199 (1978).

The State of Ohio recognized this requirement and made allegations of criminal or unlawful conduct against Petitioner Martin. Like alibi, **e.g., Stump v. Bennett**, 398 F.2d 111 (8th Cir. 1978), **cert. denied**, 393 U.S. 1001 (1968); **Johnson v. Bennett**, 393 U.S. 253 (1968), and even more so than by accident, **e.g., State v. Rivers**, 50 Ohio App.2d 129, 134, 361 N.E.2d 1363, 1367 (1977),

self-defense establishes that the accused committed no crime at all. **Marts v. State,** 26 Ohio St. 162 (1875).

> "Killing . . . by one acting in self defense against an attack by another is not a crime." **State v. Jones**, 47 Ohio App.2d 8, 14; 351 N.E.2d 798, 803 (1975).

Accord, State v. Clifton, 32 Ohio App.2d 284, 290 N.E.2d 921, 922-23 (1972).

Even under the erroneous preponderance standard, if the jury "finds" self-defense, there "must be an entire acquittal . . . ." **Erwin v. State** 29 Ohio St. at 199.

In **Mullaney**, it was found to be constitutional error to require the accused to prove a fact which negated only a single element of the crime and which made a difference only as to the seriousness of the offense of which the accused was guilty. **Mullaney** should apply to the case at bar **a fortiori**, where proof of self-defense would negate the entire crime and establish complete innocence.

D. Self-Defense Negates the Voluntary Act Requirement

The voluntary act element set forth in R.C. § 2901.21(A) is defined by exception. R.C. § 2901.21(C)(2) provides that:

> "Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

A claim of self-defense negates the voluntary act element. Acts while defending one's self are not a product of the actor's volition. The reaction to an unlawful attack may very well be reflexive. Surely, "detached reflection cannot be demanded in the presence of an uplifted knife," **Brown v. United States**, 256 U.S. 335, 343 (1921), and the urge for self-preservation in the face of imminent peril may supersede any capacity of the besieged victim to control her actions. This is so because actions taken in self-defense are based upon "the 'instinct' for self-preservation and arise 'spontaneously.'"

Stoffer v. State, 15 Ohio St. at 52-53. In this sense Ms. Martin's conduct was not "willed," Holmes, The Common Law 54 (1881), and cannot be considered a completely voluntary act within the meaning of Ohio's statutory requirement.

This was the exact conclusion reached by the Ohio Court of Appeals in **State v. Hardy**, 60 Ohio App.2d at 329; 397 N.E.2d at 776 (1978):

> "A legitimate act of self defense is much more a mere reflex action than one committed voluntarily" (emphasis added).

E. Self-Defense Negates Both General Intent and the Specific Intent of Prior Calculation and Design.

1. **General Intent.** For crimes which are considered **mala in se**, it is generally recognized that the state must prove both **mens rea** and **actus reus**. **See generally Lambert v. California**, 355 U.S. 285 (1975), and **Powell v. Texas**, 392 U.S. 514 (1968).

> "Criminal liability is normally based upon the concurrence of two

> factors, 'an evil-meaning mind [and] an evil-doing hand . . . .'" **United States v. Bailey**, 444 U.S. 394, 402 (1980), **quoting Morissette v. United States**, 342 U.S. 246, 251 (1951).

Or, in the words of Justice Holmes, criminal liability is founded on "blameworthiness." Holmes, The Common Law 50 (1881).[24]

The Legislature of the State of Ohio required proof of general **mens rea**, for the Legislative Committee Note to R.C. § 2901.22 states that for conviction there must be a "blame-worthy" mental state--a "guilty state of mind." Similarly, the Committee Comment to Ohio Revised Code § 2901 states that an essential part of any crime must be "a certain guilty state of mind at the time of his act or failure."

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24. "[T]o constitute a crime against human laws, there must be first a vicious will, and second, an unlawful act consequent upon such vicious will." 4 Blackstone, Commentaries on the Laws of England, Ch. 21, p. 289 (1783), **quoted with approval**, 27 Ohio Jur. 2d, Homicide, § 6, pp. 557-8 (1957). **See also State v. Carson**, 2 Ohio Dec. Reprint 81, 82 (Hardin Cty. C.P., 1859): "Guilty knowledge is generally, and criminal intent always, necessary to constitute

A person who acts in lawful self-defense cannot be said to have a state of mind which is either "blame-worthy" or "guilty." On the contrary, proof of self-defense would disprove the existence of such a state of mind. For example, in **State v. Clifton**, 32 Ohio App.2d at 286, 287; 290 N.E.2d at 923, the Court concluded that: "Clearly, one who kills in self-defense does so without the **mens rea** that otherwise would render him culpable of the homicide."

Judge Whiteside, of the Ohio Court of Appeals, has found that:

> ". . . the existence or nonexistence of self-defense bears a direct relationship to the existence or nonexistence of the required mental elements of the crime [of aggravated murder]. **State v. Robinson**, 48 Ohio App.2d 197, 206, 209; 356 N.E.2d 725, 721 (1975) (Whiteside, concurring), **affirmed on other grounds**, 47 Ohio St. 103, 351 N.E.2d 88 (1976).

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crime" [jury charge].

As Justice Sweeney noted in his dissent below: "The affirmative defense of self-defense . . . goes to the **mens rea** of the crime charged, whether the act committed was indeed a criminal act." **State v. Martin**, 21 Ohio St.3d at 96 (A. 43-44).

Applying similar reasoning, former Chief Judge Edwards of the Sixth Circuit found:

> "Criminal intent of aggravated assault and self-defense are, in my view, completely irreconcilable. To require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent" (footnote omitted). **Isaac v. Engle**, 646 F.2d at 1136.

Proof of self-defense negates the mental element of the crime of aggravated murder. Burdening Ms. Martin with proving self-defense deprived her of her Fourteenth Amendment right to require the state to prove her guilt beyond a reasonable doubt.

2. Prior Calculation and Design. Petitioner Martin was convicted of aggravated murder, under R.C. § 2903.01. A critical

element of this offense is "prior calculation and design." Saddling the Defendant with the burden of proving self-defense relieved the State of its constitutionally mandated burden of proving this element. The conflict between the two is irreconcilable.

The Ohio Supreme Court has interpreted the elements of "prior calculation and design" to require greater thought and control on the part of the defendant than the previously utilized elements of "premeditation and deliberation."

> "Instantaneous deliberation is not sufficient to constitute prior calculation and design."
>
> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." **State v. Cotton**, 56 Ohio St.2d 8, ¶¶ 2 and

3 of the Syllabus; 381 N.E.2d 186 (1978).[25]

Thus, under Ohio law, if the Petitioner acted solely upon the instantaneous decision to preserve her own life, that fact would negate the element of "prior calculation and design." This dichotomy between self-defense and prior calculation and design was aptly demonstrated by the jury instructions below.

The trial court instructed the jury that prior calculation and design cannot be found when a defendant "acts on the spur of the moment or after momentary consideration of the purpose to kill" (T. 690; A. 14), yet self-defense demands "an honest belief . . . in imminent danger of death or serious bodily harm" (T. 700; A. 19), a belief that the defendant is about to be killed or to receive

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25. **See also** Legislative Service Commission Note to R.C. § 2903.01 (1973).

great bodily harm" (T. 701; A. 20).[26] Only acts to escape an imminent threat of death or serious bodily harm can be grounds for acquittal. If the imminence of the threat dissipates, and the defendant is "released from the danger, . . . the right to use force in self-defense [is] ended" (T. 702; A. 21). Self-defense thus cannot co-exist with prior calculation and design.

> "Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for aggravated murder." (T. 690-691; A. 14)

A killing resulting from an instantaneous eruption of events "is not one with prior calculation." **State v. Robbins**, 58 Ohio St.2d

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26. "Imminent danger" in this context is further defined in Black's Law Dictionary (Rev. Fourth Ed. 1968), as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, . . . such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense" (emphasis added).

74, 78 (1979).[27] Yet, an act in self-defense necessarily occurs on the spur of the moment, arising spontaneously in the face of an imminent danger. **Stoffer v. State**, 14 Ohio St. at 52-53. It is an instantaneous eruption of events, presenting no opportunity to avoid the danger. **State v. Robbins**, 58 Ohio St.2d at 80. The force used by the defender is "immediately necessary for the purpose of protecting [her]self." Model Penal Code § 3.04, p. 478 (1974) (emphasis added).

To prove the element of prior calculation and design, the prosecution necessarily must demonstrate that the defendant's act was not on the spur of the moment (T. 690; A. 14).

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27. The trial court further instructed the jury that prior calculation and design requires "a definite process of reasoning in advance of the killing, which . . . must have included a mental plan, involving studied consideration of the method and the means with which to kill another." (T. 690; A. 14) **See also** Legislative Service Commission Note to R.C. § 2903.01 (1983), requiring "studied care in planning or analyzing the means of the crime, as well as a scheme encompassing the death of the victim" (emphasis added). Prior calculation and design is wholly incompatible with self-defense.

By obliging the defendant to prove she acted in the belief that she was "in imminent danger," about to be killed or to receive great bodily harm (T. 701; A. 20), the Ohio trial court demanded that Earline Martin prove she acted on the spur of the moment. The trial court's instruction thus required her to disprove the essential element of prior calculation and design, and her conviction is violative of due process.

The Ohio Supreme Court stated that Appellant did not dispute the existence of these elements, including prior calculation and design. This is inaccurate. In fact, the Ohio Supreme Court did not independently analyze the relationship between self-defense and the elements of offenses.

The Ohio Supreme Court instead attempted to rely on the characterization of self-defense in **State v. Poole**, 33 Ohio St.2d 18, 19, 294 N.E.2d 888, 889 (1973), as a defense

which "admits the facts claimed by the prosecution." Such reliance is misplaced. **Poole** involved the defense of accident, not self-defense, to a charge of the first degree under the previous murder statute, and simply identified self-defense as such a defense in passing. **State v. Poole**, 33 Ohio St.2d at 19, n. 3. More importantly, all of the cases which **Poole** cited in support of this characterization, and **Poole** itself, were decided before the element of prior calculation and design was legislatively identified and defined. Therefore, **Poole** has no relevance in the determination of the relationship between self-defense and prior calculation and design.

Petitioner Martin is not asking this Court to substitute its own reading of the term 'prior calculation and design' for that of the Ohio legislature or the Ohio courts. The meaning of the term is evident in both the Legislative Service Committee notes and

Ohio decisions. The inconsistency between "prior calculation and design" and self-defense is evident upon the face of the jury instructions in the case at bar. Since prior calculation and design and self-defense so obviously negate one another, the principles of **Mullaney** and **Patterson** require that the judgment of the Ohio Supreme Court be reversed.

Sandstrom v. Montana, 442 U.S. 510 (1979), and **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), also warrant a reversal of Defendant Martin's conviction. "A jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 696, 88 L.Ed.2d 704, 715 (1986) (citing **Sandstrom**).

While the jury received general instructions as to the prosecutor's burden (T. 676, 686-7, 692-693; A. 6, 12, 15), and

the presumption of innocence (T. 676-677; A. 6-7), the jury was also specifically instructed that the burden of proof is upon the Defendant to prove the elements of self-defense by a preponderance of the evidence (T. 699-700, 703; A. 19-20, 21). Prior calculation and design and self-defense are simply irreconcilable circumstances. Ms. Martin's jury was thus faced with clearly contradictory instructions respecting allocation of the burden of persuasion on a crucial element of the offense, prior calculation and design. Such "contradictory instructions as to [an element] create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner," **Francis v. Franklin**, 105 S.Ct. at 1976, shifting the burden of proof from the prosecution to

Defendant Martin.[28]

Informing the jury at several points

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28. While **Sandstrom** and **Francis** both presented instances of unconstitutional burden-shifting by means of a presumption, the same due process test of "the way in which a reasonable juror could have interpreted the instruction" **Sandstrom v. Montana**, 442 U.S. at 514, must apply to jury instructions which, by other devices, are challenged as having the effect of relieving the state of the burden of proof enunciated in **Winship**. This test applies regardless of the device used. "It has been settled law since **Stromberg v. California**, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." **Francis v. Franklin**, 105 S.Ct. at 1976, n. 8. The **Stromberg** principle clearly applies to other burden-shifting devices, although the Court has not yet had an occasion to apply it in a non-presumption context. The issue was presented in **Patterson**. Although this Court concluded its opinion with the statement that "nothing was presumed or implied against Patterson," **Patterson v. New York**, 432 U.S. at 216, this Court had granted review in the absence of a presumptive device to consider whether "burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law" offended the constitution. **Patterson v. New York**, 432 U.S. at 198. The Court sustained Patterson's conviction as no burden-shifting occurred as to an element of the crime because the affirmative defense bore no direct relationship to any element of murder. **Patterson v. New York**, 432 U.S. at 201.

The Court's recent opinion in **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), demonstrates the Court's continued application of the **Stromberg** test to all circumstances where jurors may have been led to unconstitutional, or constitu

that the prosecutor must prove prior calculation and design beyond a reasonable doubt does not cure the due process violation. These instructions at best contradicted the allocation to the defendant of the burden of proof on self-defense. **See Francis v. Franklin**, 105 S.Ct. at 1975, 1976, and **see also Cabana v. Bullock** at 714-715, n. 2. No instructions were provided the jury that would lead them to reconcile the conflicting instructions in a constitutionally permissible manner.

(cont.)

tionally inadequate, decision-making. In **Bullock**, the Court used the **Stromberg** test in ascertaining whether the capitally sentenced Bullock had been found by the jury to have actually killed, attempted to kill or possessed the intent to kill the victim as required by the Eighth Amendment. **See Enmund v. Florida**, 458 U.S. 782 (1982). The Court found that a "fair-minded juror . . . could have understood [the jury instructions] to mean that the jury could find Bullock guilty of capital murder without regard to his intent." **Cabana v. Bullock**, 88 L.Ed. 2d at 714. **Bullock** involved no presumptions, nor burden-shifting, yet the Court applied the **Stromberg** analysis. That same analysis should apply here to a non-presumptive, but burden-shifting, instruction.

The burden-shifting was repetitive and permeated the entire charge. The conflict was inherent throughout the instructions. While the jurors were told to resolve inferences equally consistent with guilt or innocence in favor of the Defendant (T. 681; A. 8), they were at the same time specifically told to convict if the evidence regarding self-defense was in equipoise (T. 703-704; A. 21). On these instructions, the jurors were informed that the state had the burden to prove prior calculation and design beyond a reasonable doubt but what the jurors were not explicitly told was that self-defense could provide that reasonable doubt. Indeed, a reasonable juror may well have believed that Earline Martin had to prove the absence of prior calculation and design by a

preponderance of the evidence to be acquitted.[29]

Finally, the instructions created confusion by yet another conflicting duty. The jurors were instructed: "Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant unlawfully and purposely and with prior

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29. The jurors received a written copy of the instructions (T. 686; A. 11), and therefore had the opportunity to review them. It is possible that some jurors may have disagreed with the judge's instructions that the Defendant must prove her innocence, i.e., that her act was in self-defense. However, it is highly unlikely that such disagreement would have influenced deliberations. The first instruction the jury received was that it was their sworn duty to apply the law as given, and that they "are not permitted to change the law, not to apply your own ideas of what you think the law ought to be" (T. 673; A. 4). One of the last instructions the jury received was that they "not invad[e] [the judge's] area, which is relative to the law (T. 705; A. 22). The jury was also repeatedly admonished not to be "swayed or influenced by considerations such as sympathy" (T. 673; A. 4-5, and see 704; A. 22). Therefore, even if some jurors were possibly unhappy with the law's allocation of burden, they were not permitted the opportunity to act on those concerns.

calculation and design, caused the death of another . . ." (emphasis added) (T. 686; A. 12). The jury was told there was a right of self-defense (T. 702; A. 20-21) and that an act performed in self-defense is "justified" (T. 699, 700; A. 19, 20).

Therefore, the jurors were directed that the prosecution must prove that her act was unlawful, and yet Ms. Martin had to prove her act was justified, i.e., lawful. These instructions are irreconcilable, and a reasonable juror might well reconcile the two by placing the burden of proof on the Defendant to prove her act lawful. This interpretation offends due process, and this Court cannot, on this record, be assured this path was not taken.

III.

DUE PROCESS REQUIRES THAT THE STATE BEAR THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE ACCUSED'S ACTIONS WERE UNLAWFUL AND NOT IN SELF-DEFENSE.

It is axiomatic that the State may not convict and punish an accused for a crime unless it has proved his guilt beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970). This fundamental due process standard was not met in the instant case. The State was not required to prove that Ms. Martin's actions were unlawful and constituted a crime. On the contrary, Ms. Martin was required to prove that she acted lawfully in self-defense.

In **Winship**, 397 U.S. at 363-364, this Court identified several vital interests protected by the reasonable doubt standard: the liberty and good name of the accused; reducing the risk of convictions based on factual error; and commanding the respect and confidence of the community in applications of the

criminal law. As in **Mullaney v. Wilbur**, 421 U.S. at 700, these interests are implicated to a greater degree here. Ms. Martin faced a life sentence and stigmatization as a murderer if convicted. If acquitted, she would be set free. Both the consequences to Ms. Martin and the community's interest in seeing only the guilty punished required that the State prove that she acted unlawfully.

Moreover, requiring Ms. Martin to prove the critical fact in dispute--whether or not she acted in self-defense--increased the likelihood of an erroneous conviction. **Id.**, at 701. This Court held in **Mullaney** that:

> "[s]uch a result contravenes the principle articulated in **Speiser v. Randall**, 357 U.S. 513, 525-526 (1958):"
>
> > '[w]here one party has at stake an interest of transcending value--as a criminal defendant his liberty--th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial . . ." **See also In re Winship**,

397 U.S. at 370-372 (Harlan, J., concurring). **Id.**

See also, Patterson, 432 U.S. at 215.[30] Accordingly, due process requires the State to bear the ultimate burden of persuasion on the issue of self-defense, a fact so critical to culpability.

The practical effect of requiring an accused to prove self-defense by a preponderance of evidence is appalling. Under this burden of proof, Ms. Martin could have received a life sentence when it was as likely as not that she was innocent. As this Court recognized in **Mullaney,** 421 U.S. at 703, this is an intolerable result in a society where "it is far worse to convict an innocent man than to let a guilty man go free." **See Winship,** 397 U.S. at 372 (Harlan, J., concurring). It can only be remedied by requiring

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30. "Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

the State to prove beyond a reasonable doubt that the accused did not act in self-defense. Otherwise, guilt may be found even where there is a reasonable doubt that the defendant's actions were criminal.

Additionally, under Ohio law a jury must decide guilt or innocence based on conflicting and confusing instructions. On the one hand, the jury is told the accused is presumed innocent and the State must prove guilt beyond a reasonable doubt. On the other, the jury is instructed that the defendant is required to prove his claim of self-defense by a preponderance of the evidence. While lawyers may reconcile those instructions, there is

substantial doubt that lay jurors can.[31] Due process demands that the jury clearly understand the proper standard of proof for deciding guilt or innocence. **Sandstrom v. Montana**, 442 U.S. 510 (1979); **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); **Cabana v. Bullock**, 474 U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Indeed, the overwhelming number of jurisdictions in the United States have recognized this fact and require the state to bear the burden of proof upon the issue of self-defense. **See** cases summarized in the Appendix

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31. **See** Comment, "Shifting the Burden of Proving Self-Defense--With Analysis of Related Ohio Law," 11 Akron L. Rev. 717, 744 (1978). Several courts have held similar instructions placing the burden of proof on the issue of self-defense on the defendant to be conflicting and confusing. **See Thomas v. Leeke**, 725 F.2d 246 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 218 (1984); **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986), **reh. en banc granted**, ___ F.2d ___; **State v. Millet**, 273 A.2d 504 (Maine 1971), and cases cited therein; **Leonard v. People**, 369 P.2d 54 (Colorado 1962); **Lester v. State**, 121 So.2d 110 (Alabama 1960); **see also Cherry v. Jago**, 722 F.2d 1296 (6th Cir. 1983) (Jones, J., dissenting) **cert. denied**, ___ U.S. ___, 104 S.Ct. 3518 (1984).

to this brief at A-4. Placing the burden on the State to prove the absence of self-defense has the virtue of relative simplicity and comports with **Winship**. **See State v. Millet**, 273 A.2d at 507.

If this Court is to remain true to the principles of **Winship**, it cannot countenance the conviction in this case under a lesser standard of proof. The State cannot be permitted to deprive the accused of her liberty and good name without being required to prove that her actions were unlawful. Actions taken in self-defense are not a crime. Before the State may punish an accused, she must be shown to be morally blameworthy. **See** Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases," 77 Yale L.J. 880, at 890, 911 (1968). This is fundamental to basic notions of due process.

Further, to require the accused to prove her innocence on the "critical fact in

dispute" compounds the **Winship** violation. It not only conflicts with the overriding presumption of innocence, but increases the risk that an innocent person will be convicted. **Mullaney v. Wilbur**, 421 U.S. at 701. It is certainly not a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." **Addington v. Texas**, 441 U.S. 418, 423 (1979). As this court said in **Winship**, 397 U.S. at 364:

> "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

Such doubt pervades the instant case.

CONCLUSION

Because an act taken in self-defense is innocent conduct which is protected by the United States Constitution, the State cannot require an accused to bear the burden of proof on that issue because to do so would require the accused to prove her innocence in violation of the principle announced in **In re**

Winship. Equally as important, a functional analysis demonstrates that proof of self-defense necessarily negates several ingredients of the crime which the State must prove in order to establish guilt beyond a reasonable doubt. Consequently, the principles announced in **Mullaney** and **Patterson** prohibit the placement of the burden of proof upon the issue of self-defense on the accused.

Accordingly, the judgment of the Ohio Supreme Court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Brief for Ohio Public Defender Commission As **Amicus Curiae** In Support Of Petitioner were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
GREGORY L. AYERS
Counsel for **Amicus Curiae**

A P P E N D I X

FEDERAL CASES TREATING STATE LAW WITH RESPECT TO SELF-DEFENSE AND THE BURDEN OF PROOF

Fourth Circuit

Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982) [Maryland law: self-defense exonerates an accused of any degree of culpable homicide].

Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), **cert. denied**, 444 U.S. 950 (1979) [North Carolina law: self-defense negates unlawfulness].

Sarah Thomas v. William D. Leeke, 725 F.2d 246 (4th Cir. 1983), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.Ed.2d 148 (1984). Though the decision in this case is based upon a finding of confusion between the instructions upon the state's burden to prove guilt beyond a reasonable doubt and the defendant's burden to prove self defense, it is clear that the underlying problem was that the Court found self-defense to be inconsistent with guilt.

Frazier v. Weatherholtz, 572 F.2d 994, 995 (4th Cir. 1978), **cert. denied**, 439 U.S. 876 (1978) [Virginia law: no infirmity in requiring defendant to establish self-defense "to the extent of raising . . . a reasonable doubt as to whether or not he acted in the lawful exercise of such right"]; **Baker v. Muncy**, 619 F.2d 327 (4th Cir. 1980) [Virginia law: following **Frazier**]. **See** discussion of **Frazier** in **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986) at 1187-1189 (J. Murnaghen) (pending for rehearing **en banc**); **cf.** 1194 (J. Sneeden, dissenting).

Fifth Circuit

Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981) [Georgia law: self-defense negates unlawfulness]; **McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981) [Georgia law: self-defense negates unlawfulness].

Sixth Circuit

Compare Carter v. Jago, 637 F.2d 449 (6th Cir. 1980), **cert. denied**, 456 U.S. 980 (1982); **Thomas v. Arn**, 704 F.2d 865 (6th Cir. 1983); **Nieb v. Jago**, 695 F.2d 228 (6th Cir. 1982), **cert. denied**, 463 U.S. 1210; **Jones v. Jago**, 701 F.2d 45 (6th Cir. 1983), **cert. denied**, 464 U.S. 914; **Long v. McKeen**, 722 F.2d 286 (6th Cir. 1983), **cert. denied**, 465 U.S. 1106 (1984); **Melchior v. Jago**, 723 F.2d 486 (6th Cir. 1983), **cert. denied**, 466 U.S. 952 (1984) (Contie, J., concurring), **White v. Arn**, 788 F.2d 338 (6th Cir. 1986), **petition for writ of certiorari pending**, and **Wilson v. McMacken**, 786 F.2d 216 (6th Cir. 1986), rejecting arguments similar to those presented in the instant case **with Hooper v. Perini**, 641 F.2d 445, 446 (6th Cir. 1981), **cert. denied**, 454 U.S. 817; **Thomas v. Arn**, 704 F.2d 865, 876, n. 13 (6th Cir. 1983) [indicating that self-defense negated the malice element under the pre-1974 Ohio murder statute] and **Isaac v. Engle**, 646 F.2d 1129, 1136 (6th Cir. 1980) (**en banc**) (Edwards, C.J., concurring), **rev'd on other grounds sub nom. Engle v. Isaac**, 456 U.S. 107 (1984). It should also be noted that in **Webster v. Engle**, 721 F.2d 566, 569 (6th Cir. 1983), and **Melchior v. Jago**, 723 F.2d 486, 492 (6th Cir. 1984), **cert. denied**, 466 U.S. 952, it was indicated that the question of whether it was unconstitutional to place the burden of proof on the issue of self-defense was one which

was "open" and still not resolved within the Circuit.

Eleventh Circuit

See Lamb v. Jernigan, 683 F.2d 1332, 1336 (11th Cir. 1982), **cert. denied**, 460 U.S. 1024 (1983) [Georgia law: self-defense negates malice] (**dicta**).

BURDENS OF PROOF ON SELF-DEFENSE IN VARIOUS STATES

Type A: The defendant has no burden other than the assertion of self-defense, as the absence of self-defense is considered an element of the offense.

Type B: The defendant has the burden of going forward with the evidence showing self-defense. The quality of the evidence required varies from state to state. The range is "some credible evidence" to "evidence sufficient to create a reasonable doubt in the minds of the jurors." Once the defendant has met this burden of production, the state must show the absence of self-defense or the defendant is acquitted.

Type C: In order to be acquitted, the defendant must prove by a preponderance of the evidence that he acted in self-defense.

AUTHORITIES FOR BURDENS OF PROOF IN THE VARIOUS STATES

TYPE A

Louisiana	**State v. Brown**, 414 So.2d 726 (La. 1982); **State v. Buchanan**, 439 So.2d 576 (So. App. 1983)
Oregon	Oregon Revised Statutes §§ 161.055, 161.190 and 161.209

TYPE B

Alabama	**Henson v. State**, 112 Ala. 41, 21 So. 79 (1896), **overruled on other grounds, McGhee v. State**, 178 Ala. 4, 59 So. 573 (1912); **Lester v. State**, 121 So.2d 110 (Ala. 1960); **Ex Parte Allen Johnson**, 433 So.2d 479 (Ala. 1983).
Alaska	Alaska Statutes §§ 11.81.330, 11.81.335, 11.81.300, 11.81.900(15); **Brown v. State**, 698 P.2d 671 (Alaska Ct. App. 1985); **Weston v. State**, 682 P.2d 1119 (Alaska 1984).

TYPE B (con't)

Arizona	**State v. Hunter**, 142 Ariz. 88, 688 P.2d 980 (1984); **State v. Saurevathong**, 130 Ariz. 461, 636 P.2d 1243 (Ariz. App. 1981).
Arkansas	Arkansas Statutes Annotated §§ 41-110(3), 41-506, 41-507; **Peals v. State**, 266 Ark. 410, 584 S.W.2d 1 (1979).
California	**People v. Adrian**, 134 Cal. App.3d 443, 184 Cal. Rptr. 592 (Ct. App. 1982), **on rehearing**, 135 Cal. App.3d 335, 185 Cal. Rptr. 506 (Ct. App. 1982).
Colorado	Colorado Revised Statutes §§ 18-1-407 and 18-1-704.
Connecticut	Connecticut General Statutes Annotated §§ 53a-19, 53a-16, 53a-12; **State v. Hardwick**, 1 Conn. App. 609, 475 A.2d 315 (Conn. App. 1984).
Delaware	Delaware Code Annotated §§ 11-464, 11-461, 11-303.

TYPE B (con't)

Dst. of Columbia	No dispositive authority.
Florida	**Brown v. State**, 454 So.2d 596 (Fla. App. 1984).
Georgia	**Walden v. State**, 251 Ga. 505, 307 S.E.2d 474 (Ga. 1983).
Hawaii	Hawaii Revised Statutes §§ 703-301, 701-115(2)(a), and 703-304; **State v. Sanchez**, 636 P.2d 1365 (Hawaii App. 1981); **State v. Reclina**, 616 P.2d 229 (Hawaii App. 1980).
Idaho	**State v. Jurko**, 245 P. 685 (1926).
Illinois	Illinois Revised Statutes Chapter 38, §§ 7-1 and 3-2.
Indiana	**Clark v. State**, 159 Ind. 60, 64 N.E. 589 (1902); **Lawson v. State**, 171 Ind. 431, 84 N.E. 974 (1908); **McCann v. State**, 466 N.E.2d 421 (Ind. 1984).

TYPE B (con't)

Iowa	**State v. Sharkey**, 311 N.W.2d 68 (1981); **State v. Overstreet**, 243 N.W.2d 880 (1976).
Kansas	**State v. Smith**, 161 Kan. 230, 167 P.2d 594 (1946); **State v. Beard**, 220 Kan. 580, 552 P.2d 900 (1976).
Kentucky	Kentucky Revised Statutes §§ 503.050 and 500.070(1).
Maine	Maine Revised Statutes Annotated Chapter 17A §§ 108 and 101(1); **State v. Lagasse**, 410 A.2d 537 (Me. 1980).
Maryland	**Squire v. State**, 280 Md. 132, 368 A.2d 1019 (1977); **State v. Evans**, 278 Md. 197, 362 A.2d 629 (1976).
Massachusetts	**Commonwealth v. Kamishlian**, 21 Mass. App. 931, 486 N.E.2d 743 (Mass. App. 1985); **Commonwealth v. Rodriguez**, ___ Mass. ___, 352 N.E.2d 203 (1976).

TYPE B (con't)

Michigan	**People v. Coughlin**, 65 Mich. 704, 32 N.W. 905 (Mich. 1887); **People v. Stallworth**, 364 Mich. 528, 111 N.W.2d 742 (Mich. 1961); **People v. Norwood**, 333 N.W.2d 255 (Mich. App. 1983).
Minnesota	**State v. McPherson**, 114 Minn. 498, 131 N.W. 645 (1911); **State v. Graham**, 371 N.W.2d 204 (Minn. 1985).
Mississippi	**Ford v. State**, 73 Miss. 734, 19 So. 665 (1896); **Hampton v. State**, 99 Miss. 176, 54 So. 722 (1911).
Missouri	Missouri Revised Statutes §§ 563.031 and 556.051.
Montana	**State v. Lopez**, 185 Mont. 187, 605 P.2d 178 (1980); **State v. Grady**, 166 Mont. 168, 531 P.2d 681 (1975); Montana Code Annotated § 45-3-115 (1984).
Nebraska	**State v. Samuels**, 205 Neb. 585, 289 N.W.2d 183 (1980).
Nevada	**St. Pierre v. State**, 96 Nev. 888, 620 P.2d 1240 (1980); **Kelso v. State**, 95 Nev. 37, 588 P.2d 1035 (1979).

TYPE B (con't)

New Hampshire	New Hampshire Revised Statutes Annotated §§ 626: 7(I)(a) and 627: 4(II)(a).
New Jersey	**State v. Gardner**, 51 N.J. 444, 242 A.2d 1 (1968); **State v. Chiarello**, 69 N.J. Super. 479, 174 A.2d 506 (1961).
New Mexico	**State v. Martinez**, 95 N.M. 421, 622 P.2d 1041 (1981); **State v. Cochran**, 78 N.M. 292, 430 P.2d 863 (1967).
New York	New York Penal Law 25.00, 35.00, and 35.10 (McKinney 1965).
North Carolina	**State v. Herbin**, 298 N.C. 441, 259 S.E.2d 263 (1979); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975).
North Dakota	**State v. Hazlet**, 16 N.D. 426, 113 N.W. 374 (1907).
Oklahoma	**Cottrel v. State**, 458 P.2d 328 (1969).

TYPE B (con't)

Pennsylvania	**Commonwealth v. Schaller**, 493 Pa. 426, 426 A.2d 1090 (1981); **Commonwealth v. Black**, 376 A.2d 627 (1977).
Rhode Island	**In re Doe**, 390 A.2d 920 (1978).
South Dakota	**State v. Reddington**, 80 S.D. 390, 125 N.W.2d 58 (1963); **State v. Wilcox**, 48 S.D. 289, 204 N.W. 369 (1925).
Tennessee	**Henley v. State**, 520 S.W.2d 361 (1974); **Myers v. State**, 185 Tenn. 264, 206 S.W.2d 30 (1947).
Texas	**Luck v. State**, 588 S.W.2d 371 (1979).
Utah	**State v. Torres**, 619 P.2d 694 (1980).
Virginia	**McGhee v. Commonwealth**, 219 Va. 560, 248 S.E.2d 808 (1978); **Frazier v. Weatherholz**, 572 F.2d 994 (4th Cir. 1978).

TYPE B (con't)

Washington	**State v. McCullum**, 98 Wash.2d 484, 656 P.2d 1064 (1983); **State v. Hanton**, 94 Wash.2d 129, 614 P.2d 1280 (1980).
West Virginia	**Bowman v. Leverette**, 289 S.E.2d 435 (1982); **State v. Kirtley**, 252 S.E.2d 374 (1978).
Wisconsin	**State v. Staples**, 99 Wis.2d 364, 299 N.W.2d 270 (1980).
Wyoming	**Schiekofsky v. State**, 636 P.2d 1107 (1981); **Loy v. State**, 26 Wyo. 381, 185 P. 796 (1919).

TYPE C

Ohio	Ohio Revised Code § 2901.05(A) (1982).
South Carolina	**State v. Bolton**, 266 S.C. 444, 223 S.E.2d 863 (1976).

MOTION FILED
JUL 11 1986

No. 85-6461

In The Supreme Court Of The United States

OCTOBER TERM, 1985

EARLINE MARTIN, Petitioner,

vs.

STATE OF OHIO, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR OHIO PUBLIC DEFENDER COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE
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EARLINE MARTIN, Petitioner,

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Ohio Public Defender Commission hereby respectfully moves for leave to file the attached brief **amicus curiae** in support of Petitioner in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

The interest of the Ohio Public Defender Commission in this case arises from the fact that it and other appointed counsel in Ohio represent many criminal defendants similarly

situated to Petitioner. The issue raised by Petitioner of concern to **Amicus** is Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of evidence. **Amicus** represents the interests of a large number of Ohio attorneys who believe that Ohio law on this issue is in conflict with the Due Process Clause of the Fourteenth Amendment.

In the instant case, **Amicus** believes the resolution of this issue will depend on whether this Court finds that self-defense negates any facts necessary to prove the crime of aggravated murder under Ohio law. **See Patterson v. New York**, 432 U.S. 197, 206-207 (1977). While Petitioner's argument broadly addresses this issue, **Amicus** believes that the brief it is requesting permission to file contains a more detailed analysis of the pertinent elements of Ohio law and their relationship to self-defense. Additionally, the brief **amicus curiae** contains a discussion

of where the federal courts and other states stand on this issue, not contained in Petitioner's brief.

For these reasons, **Amicus** requests leave to file the attached brief **amicus curiae** in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Motion for Leave to File Brief **Amicus Curiae** and Brief **Amicus Curiae** were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
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INTEREST OF AMICUS CURIAE

The Ohio Public Defender Commission was created by Ohio law in 1976. Its purpose is to provide, supervise and coordinate legal representation at state expense for indigent and other persons. Ohio Revised Code § 120.01. One of its primary responsibilities is to provide legal representation to criminal defendants in felony trials, appeals and post-conviction matters. Additionally, the Commission provides technical aid and assistance in criminal cases to county public defenders and appointed counsel throughout the State of Ohio. As a result, the Commission is concerned with the case at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants. Petitioner's written consent to the Commission's filing a brief **amicus curiae** in support of Petitioner has been filed with the Clerk's office. Respondent's consent was requested but refused.

The Commission has represented clients in criminal cases before this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Northern and Southern Districts of Ohio. The Commission has also filed **amicus** briefs in various Ohio courts in other actions which involved the rights of criminal defendants.

The resolution of the issue in this case will directly affect how Commission attorneys and other members of the criminal defense bar in Ohio handle cases involving the issue of self-defense. Also, other Ohio defendants, similarly situated to Petitioner, are being represented by Commission attorneys and will be directly affected by the outcome.

SUMMARY OF ARGUMENT

Amicus submits that the decision below is erroneous for three primary reasons. First, the defense of self-defense establishes that the actor was engaged in lawful,

innocent behavior. Since **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring a defendant to prove her innocence, the State of Ohio is barred from burdening her with proving self-defense.

Second, under an elements analysis stemming from **Mullaney v. Wilbur**, 421 U.S. 684 (1975), and **Patterson v. New York**, 432 U.S. 197 (1977), self-defense negates several elements of the crime of aggravated murder: (1) unlawfulness; (2) "peace and dignity" requirement of the Ohio Constitution [Article IV, § 20 and Revised Code § 2941.06]; (3) criminal conduct; (4) the voluntary act requirement [**see** Revised Code § 2901.21(C)]; and (5) criminal intent (purposely, with prior calculation and design) [**see** Revised Code § 2903.01(A)].

Third, due process requires that the State bear the burden of proving beyond a reasonable doubt that the accused's actions were unlawful and not in self-defense.

ARGUMENT

I.

SINCE SELF-DEFENSE IS CONSTITUTIONALLY PROTECTED INNOCENT CONDUCT, AN ACCUSED CANNOT BE REQUIRED TO BEAR THE BURDEN OF PROOF ON THAT ISSUE.

The State of Ohio cannot make self-defense a crime. Any such attempt by the State violates both its own Constitution[1] and several provisions of the Federal Constitution.

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1. Article I, Section 1 of the Ohio Constitution provides, in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . . and obtaining . . . safety" (emphasis added).

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense and security . . ." (emphasis added).
>
> This latter provision is "intended to . . . afford the citizen [a] means for his defense of self and property." **State v. Hogan**, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900).

First, a command by the state that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd.

> ". . . the law cannot prevent [self-defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat." O. W. Holmes, Jr., The Common Law 47 (1881).

For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[2]

Second, to punish one whose only "crime" was to save her own life when attacked by a wrongdoer would be violative of the cruel and

---

2. In **State v. Hardy**, 60 Ohio App.2d 325, 329, 397 N.E.2d 773, 776 (1978), the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, . . . without due process of law. Obviously, the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

unusual punishment provision of the Eighth Amendment.[3] Equally as important, any attempt to deprive the people of the "right" of self-defense by making self-defense criminal would deny them constitutional rights reserved and protected by substantive due process under the Fourteenth Amendment and the rights reserved to the people under the Ninth Amendment.

With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." **Snyder v. Massachusetts**, 291 U.S. 97, 105 (1934), **quoted**

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3. The Eighth Amendment prohibits cruel and unusual punishment--including punishment that is disproportionate to the "offense." **Coker v. Georgia**, 433 U.S. 584 (1977). Punishment for <u>any</u> lawful act, including self-defense, is both disproportionate and cruel and unusual. **See also Holloway v. McElroy**, 632 F.2d 605, 627, n. 35, and 636, n. 49, **cert. denied**, 451 U.S. 1028 (1981), noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

with approval, Patterson v. New York, 432 U.S. 197, 201-202 (1977). It should not be open to question that self-defense is such a right. As Judge Murnaghan wrote in **Griffin v. Martin**, 785 F.2d 1172, 1180, n. 24 (4th Cir. 1986) (pending following rehearing **en banc**):

> ". . . Since a time before the formation of our nation, and hence the existence of a Due Process Clause . . . a homicide committed in self-defense simply has been no crime."

At least since the sixteenth century, a homicide which resulted from an act done in self-defense was justifiable and not unlawful. **Mullaney v. Wilbur**, 421 U. S. 684, 692

(1975).[4] It was (and is) "lawful and justifiable to resist certain attacks, even by the death of the assailant, and the party [was] without blame." East, Treatise of the Pleas of the Crown 217 (1803).

When courts and commentators alike speak of self-defense, they speak in terms of the "right of self-defense." This phrase is not accidental, for the roots of self-defense run deep within American common law, finding its seeds in English common law. Blackstone described three primary and overriding rights

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4. Wharton's Criminal Evidence, § 224, 479 (13th ed. 1972); I, Warren on Homicide § 54, at 162 (1914); I, Warren, **supra**, at 163:

> "Criminal homicide is the unlawful killing of a human being . . ." (footnote omitted) (emphasis added). **See also** §§ 63, 64, 68.

I, Warren, **supra**, § 143, at 617; 27 Ohio Jur. 2d, Homicide, § 89, at 629 (1957):

> "It is universally recognized that one is not punishable criminally for taking the life of another person when he has been put under the necessity or apparent necessity of doing so, without any fault on his own part in order . . ."

retained by individuals "which [are] not required to be sacrificed to public convenience." 1 Blackstone, Commentaries on the Laws of England, Ch. 1, p. 129 (1783). These three rights are "the right of personal security; the right of personal liberty; and the right of private property." **Id.**

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation . . . For whatever is done by a man, to save life or member is looked upon as done upon the highest necessity and compulsion." **Id.**, at 129-130.

Even under the tyrannical reign of slavery it was acknowledged that the slave had the right to act in self-defense in order to preserve his own life.[5] Congressman John A. Bingham, author of Section I of the

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5. **State v. Will**, 18 N.C. 131, 171 (1834).

Fourteenth Amendment, treated self-defense as "the acknowledged right of man . . ."[6]

This right was also recognized in early Federal case law.

> "Where crime is committed with impunity . . . those unprotected by other sanctions . . . [are compelled] . . . to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security." **United States v. Rhodes**, 27 Fed. Cas. 785 (Cir. Ct. Ky. 1866).[7]

The right to defend one's self is a basic fundamental right rooted in such basic documents as the Declaration of Independence, stating: "that all men are endowed by their creator with certain inalienable rights . . .

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6. John A. Bingham, The Argument of John A. Bingham, Special Judge Advocate (Washington 1865) 13-14, quoted in Allen, "A Rhetorical Analysis of the Speaking of John A. Bingham with Emphasis on His Role in the Trial of the Lincoln Conspirators" (Ph.D Dissertation, Ohio State University 1963).

7. **See also Wallace v. United States**, 162 U.S. 446 (1896); **Beard v. United States**, 158 U.S. 550, 563 (1895); **Thompson v. United States**, 155 U.S. 271, 283 (1894); **Gourke v. United States**, 153 U.S. 183 (1893); and **Allen v. United States**, 164 U.S. 492 (1894).

among these are life." As recognized by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.'" **Reed v. State**, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Thus, the right of lawful self-defense has been recognized as an "inalienable right," **Id.**, at 517.[8]

In **United States v. Morris**, 125 F. 322 (E.D. Ark. 1903), Judge Trieber held that the right to lease land was a fundamental and inalienable right of every freedman. Can it be doubted that the right to defend one's own life is at least as "fundamental" and "inalienable" as the right to lease land for farming purposes?

> ". . . some truths are indeed self-evident. When a killing is, by

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8. **See also** I, Warren on Homicide, § 148, p. 639.

> reason of self-defense, rightful, not wrongful, i.e., is lawful, there is no crime." **Griffin v. Martin**, 785 F.2d 1183 (Murnaghan, J.) (pending following rehearing **en banc**).

The Ninth Amendment also recognizes that:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." **Griswold v. Connecticut**, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

The right to privacy recognized in **Griswold** would be a hollow guarantee if, in a time of necessity, a person could not defend herself from unlawful attacks without subjecting herself to criminal prosecution. This would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," **Boyd v. United States**, 116 U.S. 616, 630 (1886), and would surely sweep too broadly into an area of constitutionally protected freedom.

Ultimately, the right of self-defense:

> "reflects a fundamental societal perception that in a situation where one person must die, it is preferable that the innocent party, the non-aggressor, survive." Note, "The Constitutionality of Affirmative Defenses After Patterson v. New York," 78 Col. L. Rev. 655, 672 (1978).[9]

Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." **Stoffer v. State**, 15 Ohio St. 47, 53 (1864). It was for reasons such as these that Sixth Circuit Judge Merritt has properly concluded that:

> ". . . the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law, and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists." **Isaac v. Engle**, 646 F.2d 1129, 1140 (6th Cir. 1980) (dissent), **rev'd on other grounds sub nom, Engle v. Isaac**, 456 U.S. 107 (1982).

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9. **See also** Wechsler & Michael, "A Rationale of the Law of Homicide," 37 Columbia L. Rev. 701, 736 (May 1937).

As stated by the Fourth Circuit:

> ". . . it is elementary and fundamental to our jurisprudence that killing or wounding in self-defense is simply no crime at all." **Sarah Thomas v. William D. Leeke**, 725 F.2d 246, 250, n. 2 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.E.2d 148 (1984).

Because self-defense is a constitutionally protected right, one exercising that right is engaged in innocent conduct. To require an accused to bear the burden of proof upon the issue of self-defense is to require the accused to prove her innocence in violation of the principles enunciated in **In re Winship**.

II.

PROOF OF SELF-DEFENSE NECESSARILY NEGATES SEVERAL INGREDIENTS OF THE CRIME OF AGGRAVATED MURDER.

A. Mullaney and Patterson Analysis

Based upon **Patterson** and **Mullaney**, the analysis appropriate to this case is:

(1) identify the elements of the crime to be proven;

(2) consider whether the State of Ohio presumes any element of the crime charged;

(3) determine the relationship of affirmative defense to the crime charged; and

(4) determine if the affirmative defense negates any fact the State must prove.

The relevance of this analysis to the case **sub judice** is quite direct. Here, the Ohio Supreme Court essentially held that burdening the defendant with proving the defense of self-defense passes constitutional muster for the following reasons:

(1) the State was required to prove all of the statutory elements of the crime charged (purposely, prior calculation and design, causing death) [**State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986)];

(2) this Court's holding in **Patterson** did not require the State to disprove all affirmative defenses [**id.**, at 93];

(3) since self-defense contains facts which may be peculiarly within the defendant's knowledge, it would be too onerous to require the State to disprove those facts [**id.**, at 94]; and

(4) self-defense does not negate any elements of the offense with which Ms. Martin was charged [**id.**].

The first three grounds for the decision below are of little consequence. The mere fact that the jury is instructed that the State bears the burden of proof on all elements beyond a reasonable doubt merely brings the State in conformance with **In re Winship**. Thus, this factor simply states the obvious. Second, this Court has never held that labeling a defense as an affirmative defense allows the State to burden the defendant with proving that defense. Certainly, such a proposition would elevate form over substance, a proposition soundly rejected in **Mullaney v. Wilbur**, 421 U.S. at 699. This Court has never adopted a view of the law that would allow the use of labels to circumvent a functional analysis. Third, the characterization of self-defense as a defense peculiarly within the knowledge of the defendant cannot justify placing the burden

of proof on the defendant. That a fact may be within the knowledge of the defendant is insufficient to justify shifting the burden of proof to the defendant. **Mullaney v. Wilbur**, 421 U.S. at 702. Even though the State may be required thereby to prove a "negative" of a fact likewise is of no consequence. **Id.**, at 702, n. 31. The **Mullaney** Court soundly rejected this same rationale posited by the State of Maine:

> "No doubt this is often a heavy burden for the prosecution. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." **Id.**, at 701.

Since the first three rationales are of little significance, this Court should consider whether the Ohio Supreme Court was correct when it held that self-defense negates no elements of the crime of aggravated murder.

While this Court must initially look to the words of the statute in question to

determine whether self-defense negates any of its elements, this Court's decisions in **Mullaney** and **Patterson** also establish that the way in which those terms are interpreted by the courts of the state is of importance.

For example, in **Mullaney**, the defendant was charged with murder.[10] The defendant claimed first that he lacked the criminal intent necessary for the crime and second that the killing occurred in the "heat of passon," thereby reducing the crime to manslaughter. **Id.**, at 685. The defendant was burdened with proving that the killing occurred in the heat of passion on sudden provocation to mitigate the murder charge to manslaughter. **Id.**, at 687. **See also** Me. Rev. Stat. Ann. Tit. 17 § 2551 (1964). Had this Court only looked to the face of the

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10. Me. Rev. Stat. Ann. Tit. 17, § 2651 (1964); **Mullaney v. Wilbur**, 421 U.S. at 686, n. 3: "whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

Maine murder statute, "heat of passion" would have borne no relationship to any of the elements required to be proven. This Court, however, looked to Maine case law to determine a more accurate view of the criminal intent required for a murder conviction. In **State v. Lafferty**, 309 A.2d 647 (Me. 1973), the Maine Supreme Court held that malice aforethought was not an element of murder, disputing an interpretation of Maine law made by the Court of Appeals for the First Circuit in originally granting the Writ of Habeas Corpus. Rather, **Lafferty** held that a killing is unlawful and constitutes murder upon proof "of any deliberate, cruel act, committed by one person against another, suddenly without any, or without a considerable provocation." **State v. Lafferty**, 309 A.2d at 665.

Since absence of "heat of passion" was to be proven by the State, this Court held that the defendant could not be burdened with proving that factor. While proof of heat of

passion merely reduced the degree of culpability, the Court nonetheless held that the State could not burden the defendant with proving "heat of passion." In reaching this crucial result, the Court relied heavily upon the state court's interpretation of its own statutes.

A similar approach was taken in **Patterson** where the defendant was charged with murder in the second degree.[11] The defendant admitted the killing but defended on the ground that he killed during an extreme emotional disturbance. That defense mitigated the crime to manslaughter in the first degree. In finding that the defendant could be burdened with proving this defense, this Court looked to New York case law. Based upon that review, the Court held that "extreme emotional disturbance" did not "serve to

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11. New York Penal Law, § 125.25 (McKinney 1975); **Patterson v. New York**, 432 U.S. at 198, n. 2: "with intent to cause the death of another person, he caused the death of such person . . . ."

negative any facts of the crime which the State is to prove in order to convict of murder." **Id.**, at 207.

Under New York law, extreme emotional disturbance was defined as a "mental infirmity not arising to the level of insanity." **Patterson v. New York**, 432 U.S. at 206, **citing People v. Patterson**, 39 N.Y.2d 288, 302; 347 N.E.2d 898, 383 N.Y.S.2d 573, 582 (1976). Since this Court's prior decisions in **Leland v. Oregon**, 343 U.S. 790 (1952), and **Rivera v. Delaware**, 429 U.S. 877 (1976), unequivocally allowed the State to burden the defendant with proving insanity, New York did no more in **Patterson** than it was constitutionally permitted to do. This Court distinguished the result in **Patterson** from that in **Mullaney** primarily upon the way in which Maine had defined, in case law, the necessary elements of murder. Since, under Maine law, the absence of provocation was an element of the crime, the State could <u>not</u>

burden the defendant with proving that defense. An opposite result was reached in **Patterson** because under New York law, extreme emotional disturbance, both on the face of the statute and by judicial interpretation, bore no relationship to any of the elements charged.

Thus, **Mullaney** and **Patterson** indicate that this Court should consider not only the words contained in the homicide statute, but also the case law which gives definition and content to the proscribed offense. At the same time, both **Mullaney** and **Patterson** demonstrate that the ultimate conclusion as to whether a given defense necessarily negates an ingredient of the crime which the State is required to prove is a matter of federal law upon which this Court must exercise an independent judgment. As articulated by the Fourth Circuit:

> "The labels attached by the state legislature or supreme court are

> not dispositive . . . and the federal courts are to employ a 'functional analysis' aimed at determining whether the state has in effect incorporated the absence of the affirmative defense into the elements of the crime."[12]

Indeed, as this Court recognized in **McMillan v. Pennsylvania**, ___ U.S. ___, 54 U.S.L.W. 4709, 4711 (1986): ". . . in certain limited circumstances **Winship**'s reasonable doubt requirement applies to facts not formally identified as elements of the offense charged."

B. Self-Defense Negates Unlawfulness

By definition, an act must be "unlawful" in order to justify the imposition of criminal sanctions:

> "It should be conceded, as an axiomatic proposition that an

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12. **Cooper v. North Carolina**, 702 F.2d 481, 484 (4th Cir. 1983) [citations omitted]. **Accord: Adkins v. Bordenkircher**, 674 F.2d 279, 282 n. 6 (4th Cir. 1982). **See also Lamb v. Jernigan**, 683 F.2d 1332, 1335-1336 (11th Cir. 1982), and **Holloway v. McElroy**, 632 F.2d 605, 625, 628 (4th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981).

> indictment or information must, in some manner, charge the unlawfulness of the defendant's conduct." Anno., 169 A.L.R. 166 (1947).

Thus, the mere allegation that a crime has been committed is an allegation of unlawfulness.

Historically, criminal homicide has been defined as the "unlawful killing of a human being . . ." I Warren on Homicide, § 54, p. 163 (1914). **See also §§** 63, 64 and 68.

A review of Ohio law demonstrates that the element of "unlawfulness" has never appeared in the Ohio first-degree murder

statute.[13] Yet, Ohio cases have consistently required proof of unlawfulness in order to

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13. Prior to 1880, the statute read as follows:

> "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, . . . or by administering poison or causing the same to be done, kill another . . . ." Revised Statutes of 1854, 269; **State v. Farmer**, 156 Ohio St. 214, 218, 102 N.E.2d 11, 14 (1951); **see also Robbins v. State**, 8 Ohio St. 131, 175 (1857).

The statute was changed in 1880:

> "Whoever, purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another . . . ." **See** General Code § 12400.

The statute was next changed in 1953:

> "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." R.C. § 2901.01 (Page's 1953), Ohio Revised Code.

The statute reached its present state in 1974, where two elements (deliberate and premeditated malice) were replaced and the so-called "felony murder" aspect was given its own subsection:

> "(A) No person shall purposely, and with prior calculation and design, cause the

establish the crime of murder.[14]

From the above, it is evident this

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death of another.

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape." Ohio Revised Code § 2903.01 (Page's 1974).

Ms. Martin was charged with violating R.C. § 2903.01(A).

14. In **Ohio v. Brooks**, 1 Ohio Dec. Reprint 407 (Cuy. Co. Common Pleas 1851), the court instructed the jury as follows in a case of first-degree murder:

> "[First], murder in the first degree, which in general is an unlawful killing purposely and of premeditated malice." **Id.** at 407 (emphasis added).

For a civil case that defines murder as an unlawful killing, **see Filmore v. Insurance Co.**, 82 Ohio St. 208, 214, 92 N.E. 26 (1910).

Likewise, Ohio courts have held:

> "The defendant in a homicide case cannot be required to establish his defense of self-defense until the State has established that the killing by him was an unlawful killing . . ." **Taylor v. State**,

judicial element of unlawfulness co-existed with the element of malice. Prior to 1974, when the element of malice existed, reviewing courts consistently interpreted the two terms differently and interpreted each to be required. Thus, the presence or absence of "malice" in the relevant statute has no effect on the requirement of "unlawfulness." The

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21 Ohio C.C. Dec. 602, syllabus 2 (1909) (emphasis added). **See also Wray v. State**, 5 Ohio C.C. (N.S.) 437, 442 (1904) (emphasis added).

"Murder in the first degree, he said, is the intentional unlawful killing, by one reasonable being of another, in the peace of the state, of deliberate and premeditated malice" (emphasis added). **State v. James Turner**, Wright (Ohio Supreme Court Decisions) 20, 27 (1831), **questioned Fuller v. State**, 12 Ohio St. 431, 436 (1861).

"If the 'intent to kill,' under all the circumstances of the transaction was justifiable and lawful, for example, if in lawful self-defense, the legislature could not be held reasonably to intend to declare it an offense. It is only where the intent to kill was unlawful and wrongful that it should be held to constitute a crime . . . ." **State v. Stout**, 49 Ohio St. 270, 283-284, 30 N.E. 437, 440 (1892) (emphasis added).

unlawfulness of the criminal act must always be proven. Ohio courts have likewise held that all Ohio citizens have a right to self-defense which, if established, is a lawful justifiable act.[15]

Furthermore, the Ohio Constitution requires that all indictments allege that the offense in question was against the "peace and dignity of the State of Ohio." Article IV, § 20, Ohio Constitution.[16] This is not a mere matter of form but rather a "clear allegation that the acts done were unlawful." **Hamilton v. Alvis**, 109 Ohio App. 298, 301, 160 N.E.2d 372, 374 (1959). The purpose of the requirement was to provide:

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15. **Marts v. State**, 26 Ohio St. 162, syllabus 2 (1875); **State v. Champion**, 109 Ohio St. 281, 284, 142 N.E. 141, 142 (1924); **see also Graham v. State of Ohio**, 98 Ohio St. 77, 81-82, 120 N.E. 232, 233 (1918) ["lawful right of self-defense"]; **State v. Vancak**, 90 Ohio St. 211, 214, 107 N.E. 511, 512 (1914); **Stoffer v. State**, 15 Ohio St. at 51-52.

16. **See also** R.C. § 2941.06 and R.C. § 2941.10 (the fact of the indictment constitutes an allegation that no legal excuse exists for the act).

> "[A] sufficient and uniform conclusion to the allegations of fact constituting the charge." **State v. Stapely**, 19 Ohio Dec. 110, 111 (Hamilton Cty. Common Pleas Ct. 1908) (emphasis added). **See also State v. Nieto**, 101 Ohio St. 409, 428, 130 N.E. 663, 668 (1920) (Wanamaker, J., dissenting on other grounds).

In the case at bar, the indictment against Petitioner Martin contains the specific allegation that her conduct was "unlawful" and against the "Peace and Dignity of the State of Ohio" (A. 23).

The instructions given in the case at bar paralleled this common-law view and required the jury to find that:

> "the defendant unlawfully and purposely and with prior calculation and design, caused the death of another . . ." (emphasis added) (Transcript at 686, A. 13).

Thus, the State must necessarily admit that it was required to prove, beyond a reasonable doubt, that the accused's conduct was unlawful.

The relevant question, then, becomes whether self-defense is inconsistent with

unlawful conduct. The case law of Ohio uniformly recognizes that proof of self-defense is proof of innocence and hence inconsistent with guilt. **E.g., Silvus v. State**, 22 Ohio St. 90 (1871), **cited with approval in State v. Humphries**, 51 Ohio St. 2d 95, 98, 364 N.E.2d 1354, 1357 (1977).[17]

In his dissent, Judge Jackson of the Eighth District Court of Appeals indicated that: "Historically, self-defense has been considered to negate the unlawfulness element" (A. 16) (citations omitted). As Justice

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17. In English common law, a distinction was made between justifiable and excusable homicide. Blackstone, Commentaries on the Laws of England 177-178 (1783). Justifiable homicide carried no penalties, while excusable homicides resulted in the forfeiture of the slayer's lands. The concept of forfeiture, being foreign to American law, was discarded and the distinction between justifiable and excusable self-defense, however slight originally, disappeared. I Bishop, A Treatise on Criminal Law, § 865, 2, p. 614 (9th ed. 1982); II Bishop, **supra**, § 617, 2, p. 471; **Erwin v. State**, 29 Ohio St. 186 (1876). Under Ohio law, all actions taken in self-defense are justifiable, lawful acts done without criminal intent. **E.g., Erwin v. State, supra**, at 194-199. **See also** LaFave & Scott, Handbook on Criminal Law, § 53 at 391 (1972).

Clifford F. Brown, of the Ohio Supreme Court, noted in his dissent:

> "For more than a century, self-defense has been considered to negate the element of unlawfulness which must be present in order to convict a defendant of aggravated murder." **State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 171 (1986) (citations omitted) (A. 45).

The decisions of other state and federal courts considering this issue have consistently found self-defense to be inconsistent with unlawfulness.[18]

> "Self defense annihilates unlawfulness and malice and consequently absence of it must be proven by the prosecution beyond a reasonable doubt." **Griffin v. Martin** 785 F.2d at 1182 (Murnaghan, J.) (pending following rehearing

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18. **E.g., McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028, (1981); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975), **rev'd on other grounds sub nom. Hankerson v. North Carolina**, 432 U.S. 233 (1977); **Commonwealth v. Hilbert**, 476 Pa. 288, 300, 382 A.2d 724, 731 (Pa. 1978). **See also** cases outlined in the Appendix to this Brief at A-1.

en banc).[19]

Indeed, the jury instructions in this very case inferentially indicated the inconsistency: if the accused was found to have acted in self-defense, then no crime was committed and a verdict of not guilty was to be returned.

In Ohio Revised Code § 2901.05(A), Ohio has adopted its common-law rule requiring an accused to bear the burden of proving a claim of self-defense. This rule was justified by Ohio courts at common law, however, because every killing was presumed to be unlawful. **See Silvus v. State**, 22 Ohio St. 90 (1871); **State v. Robinson**, 161 Ohio St. 213 (1954); **State v. Kinnemore**, 34 Ohio App.2d 39 (1972).

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19. **See also White v. Arn**, 788 F.2d 338, 347, n. 14 (6th Cir. 1986) (Petition for Writ of Certiorari pending):

> "[i]f unlawfulness were a statutory element of crimes in Ohio, then self-defense would negate the element and consequently the burden of proof could not be placed upon the accused" (emphasis added).

This common-law presumption of unlawfulness is still a part of Ohio law. This is evident from the Ohio Supreme Court's decision in this case. The Court characterized the affirmative defense of self-defense as a "justification for admitted conduct" which "seeks to relieve the defendant from culpability rather than negate an element of the offense charged." **Martin**, 21 Ohio St.2d at 94. **See also Thomas v. Arn**, 704 F.2d 865, 877 (6th Cir. 1983).[20]

Thus, under Ohio law, unlawfulness (i.e., a crime) is to be presumed from proof of the elements of the offense, despite the fact that the accused may have acted in self-defense. In other words, a lawful act of self-defense is presumed to be unlawful unless

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20. "[Ohio Revised Code § 2901.05(C)(2)'s] use of the terms 'excuse' and 'justification' strongly implies that a criminal offense has been committed--i.e., that all elements of a crime have been proven beyond a reasonable doubt and that the perpetrator will be criminally liable unless an 'excuse' or 'justification' is presented." **But see** fn. 17, **supra**.

the accused establishes his innocence. **See** Note, "H. B. 1168: The Burden of Proving An Affirmative Defense," 5 U. Dayton L. Rev. 441, 458 (1980).

At the same time, Ohio's high court refuses to acknowledge that self-defense is inconsistent with the fact that a crime (unlawfulness) has occurred. **See State v. Martin**, 21 Ohio St.3d at 94 ("The elements of the crime and the existence of self-defense are separate issues"). Indeed, a plea of self-defense plainly denies, rather than admits, that a crime has occurred.

Amicus submits that the State of Ohio cannot have it both ways. Either self-defense negates the elements of the crime (i.e., unlawfulness), as it did at common law, or it does not. If it does, the State's burden is clear. **See Patterson v. New York**, 432 U.S. 197 (1977). If it does not, then the State should not get the benefit of the common-law presumption of unlawfulness (i.e., that

a crime has been committed) from the fact that a killing has occurred; and thereby shift the burden of proof to the accused to prove otherwise. **See Patterson**, 432 U.S. at 215;[21] **accord, Mullaney v. Wilbur**, 421 U.S. 684 (1975).[22]

Moreover, Ohio's utilization of this presumption of unlawfulness violates traditional due process requirements for presumptions. It satisfies neither the rational connection test, i.e., the presumed fact must more likely than not flow from the proven fact, **Leary v. United States**, 395 U.S. 6, 36 (1969); or the beyond a reasonable doubt test, i.e., proven fact must be sufficient to support inference of presumed fact beyond a reasonable doubt, **Barnes v. United States**,

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21. "[The State] may not shift burden of proof to the defendant by presuming [an] ingredient of the offense upon proof of the other elements [of the offense]."

22. Presumption of malice from proof of an unlawful and intentional killing, unless accused proved he acted in heat of passion, is unconstitutional.

412 U.S. 837, 843 (1973).[23] **See Mullaney,** 421 U.S. at 702, n. 31. There is simply no basis in either logic or experience to infer that an accused acted unlawfully from mere proof of a killing. **See** Model Penal Code, Comment to Section 1.13 (Tent. Draft No. 4, 1955) ("No one can estimate the probability" that "an intentional homicide . . . was or was not committed in self-defense"). Therefore, Ohio's continued reliance upon this common-law presumption of unlawfulness to shift the burden to the accused to prove her act lawful violates due process.

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23. **Amicus** submits that Ohio's presumption of unlawfulness must satisfy the beyond a reasonable doubt test as it is a mandatory presumption. **See Francis v. Franklin,** 471 U.S. ___, 85 L.Ed.2d 344, 353 (1985) (mandatory presumption is one jury must infer if state proves certain predicate facts); **accord, Sandstrom v. Montana,** 442 U.S. 510 (1979). Ohio's presumption of unlawfulness is mandatory because it is established upon proof of the elements of the offense even though the defendant may have acted lawfully in self-defense.

C. **Self-Defense Negates Criminal Conduct**

It is axiomatic that the State can only punish criminal conduct. **E.g., Robinson v. California**, 370 U.S. 660 (1962); **Powell v. Texas**, 392 U.S. 514 (1968). It has been held since the 1600s that killing another in self-defense is conduct which is justified--no crime has been committed. **Mullaney v. Wilbur**, 421 U.S. at 692. This has always been the law in Ohio. **E.g., Marts v. State**, 26 Ohio St. 162 (1875) (Syllabus 2), **cited with approval, State v. Melchior**, 56 Ohio St.2d 15, 21, 381 N.E.2d 195, 199 (1978).

The State of Ohio recognized this requirement and made allegations of criminal or unlawful conduct against Petitioner Martin. Like alibi, **e.g., Stump v. Bennett**, 398 F.2d 111 (8th Cir. 1978), **cert. denied**, 393 U.S. 1001 (1968); **Johnson v. Bennett**, 393 U.S. 253 (1968), and even more so than by accident, **e.g., State v. Rivers**, 50 Ohio App.2d 129, 134, 361 N.E.2d 1363, 1367 (1977),

self-defense establishes that the accused committed no crime at all. **Marts v. State,** 26 Ohio St. 162 (1875).

> "Killing . . . by one acting in self defense against an attack by another is not a crime." **State v. Jones**, 47 Ohio App.2d 8, 14; 351 N.E.2d 798, 803 (1975).

Accord, State v. Clifton, 32 Ohio App.2d 284, 290 N.E.2d 921, 922-23 (1972).

Even under the erroneous preponderance standard, if the jury "finds" self-defense, there "must be an entire acquittal . . . ." **Erwin v. State** 29 Ohio St. at 199.

In **Mullaney**, it was found to be constitutional error to require the accused to prove a fact which negated only a single element of the crime and which made a difference only as to the seriousness of the offense of which the accused was guilty. **Mullaney** should apply to the case at bar **a fortiori**, where proof of self-defense would negate the entire crime and establish complete innocence.

D. Self-Defense Negates the Voluntary Act Requirement

The voluntary act element set forth in R.C. § 2901.21(A) is defined by exception. R.C. § 2901.21(C)(2) provides that:

> "Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

A claim of self-defense negates the voluntary act element. Acts while defending one's self are not a product of the actor's volition. The reaction to an unlawful attack may very well be reflexive. Surely, "detached reflection cannot be demanded in the presence of an uplifted knife," **Brown v. United States**, 256 U.S. 335, 343 (1921), and the urge for self-preservation in the face of imminent peril may supersede any capacity of the besieged victim to control her actions. This is so because actions taken in self-defense are based upon "the 'instinct' for self-preservation and arise 'spontaneously.'"

Stoffer v. State, 15 Ohio St. at 52-53. In this sense Ms. Martin's conduct was not "willed," Holmes, The Common Law 54 (1881), and cannot be considered a completely voluntary act within the meaning of Ohio's statutory requirement.

This was the exact conclusion reached by the Ohio Court of Appeals in **State v. Hardy**, 60 Ohio App.2d at 329; 397 N.E.2d at 776 (1978):

> "A legitimate act of self defense is much more a mere reflex action than one committed voluntarily" (emphasis added).

E. Self-Defense Negates Both General Intent and the Specific Intent of Prior Calculation and Design.

1. **General Intent.** For crimes which are considered **mala in se**, it is generally recognized that the state must prove both **mens rea** and **actus reus**. **See generally Lambert v. California**, 355 U.S. 285 (1975), and **Powell v. Texas**, 392 U.S. 514 (1968).

> "Criminal liability is normally based upon the concurrence of two

> factors, 'an evil-meaning mind [and] an evil-doing hand . . . .'" **United States v. Bailey**, 444 U.S. 394, 402 (1980), **quoting Morissette v. United States**, 342 U.S. 246, 251 (1951).

Or, in the words of Justice Holmes, criminal liability is founded on "blameworthiness." Holmes, The Common Law 50 (1881).[24]

The Legislature of the State of Ohio required proof of general **mens rea**, for the Legislative Committee Note to R.C. § 2901.22 states that for conviction there must be a "blame-worthy" mental state--a "guilty state of mind." Similarly, the Committee Comment to Ohio Revised Code § 2901 states that an essential part of any crime must be "a certain guilty state of mind at the time of his act or failure."

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24. "[T]o constitute a crime against human laws, there must be first a vicious will, and second, an unlawful act consequent upon such vicious will." 4 Blackstone, Commentaries on the Laws of England, Ch. 21, p. 289 (1783), **quoted with approval**, 27 Ohio Jur. 2d, Homicide, § 6, pp. 557-8 (1957). **See also State v. Carson**, 2 Ohio Dec. Reprint 81, 82 (Hardin Cty. C.P., 1859): "Guilty knowledge is generally, and criminal intent always, necessary to constitute

A person who acts in lawful self-defense cannot be said to have a state of mind which is either "blame-worthy" or "guilty." On the contrary, proof of self-defense would disprove the existence of such a state of mind. For example, in **State v. Clifton**, 32 Ohio App.2d at 286, 287; 290 N.E.2d at 923, the Court concluded that: "Clearly, one who kills in self-defense does so without the **mens rea** that otherwise would render him culpable of the homicide."

Judge Whiteside, of the Ohio Court of Appeals, has found that:

> ". . . the existence or nonexistence of self-defense bears a direct relationship to the existence or nonexistence of the required mental elements of the crime [of aggravated murder]. **State v. Robinson**, 48 Ohio App.2d 197, 206, 209; 356 N.E.2d 725, 721 (1975) (Whiteside, concurring), **affirmed on other grounds**, 47 Ohio St. 103, 351 N.E.2d 88 (1976).

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crime" [jury charge].

As Justice Sweeney noted in his dissent below: "The affirmative defense of self-defense . . . goes to the **mens rea** of the crime charged, whether the act committed was indeed a criminal act." **State v. Martin**, 21 Ohio St.3d at 96 (A. 43-44).

Applying similar reasoning, former Chief Judge Edwards of the Sixth Circuit found:

> "Criminal intent of aggravated assault and self-defense are, in my view, completely irreconcilable. To require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent" (footnote omitted). **Isaac v. Engle**, 646 F.2d at 1136.

Proof of self-defense negates the mental element of the crime of aggravated murder. Burdening Ms. Martin with proving self-defense deprived her of her Fourteenth Amendment right to require the state to prove her guilt beyond a reasonable doubt.

2. Prior Calculation and Design. Petitioner Martin was convicted of aggravated murder, under R.C. § 2903.01. A critical

element of this offense is "prior calculation and design." Saddling the Defendant with the burden of proving self-defense relieved the State of its constitutionally mandated burden of proving this element. The conflict between the two is irreconcilable.

The Ohio Supreme Court has interpreted the elements of "prior calculation and design" to require greater thought and control on the part of the defendant than the previously utilized elements of "premeditation and deliberation."

> "Instantaneous deliberation is not sufficient to constitute prior calculation and design."
>
> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." **State v. Cotton**, 56 Ohio St.2d 8, ¶¶ 2 and

3 of the Syllabus; 381 N.E.2d 186 (1978).[25]

Thus, under Ohio law, if the Petitioner acted solely upon the instantaneous decision to preserve her own life, that fact would negate the element of "prior calculation and design." This dichotomy between self-defense and prior calculation and design was aptly demonstrated by the jury instructions below.

The trial court instructed the jury that prior calculation and design cannot be found when a defendant "acts on the spur of the moment or after momentary consideration of the purpose to kill" (T. 690; A. 14), yet self-defense demands "an honest belief . . . in imminent danger of death or serious bodily harm" (T. 700; A. 19), a belief that the defendant is about to be killed or to receive

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25. **See also** Legislative Service Commission Note to R.C. § 2903.01 (1973).

great bodily harm" (T. 701; A. 20).[26] Only acts to escape an imminent threat of death or serious bodily harm can be grounds for acquittal. If the imminence of the threat dissipates, and the defendant is "released from the danger, . . . the right to use force in self-defense [is] ended" (T. 702; A. 21). Self-defense thus cannot co-exist with prior calculation and design.

> "Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for aggravated murder." (T. 690-691; A. 14)

A killing resulting from an instantaneous eruption of events "is not one with prior calculation." **State v. Robbins**, 58 Ohio St.2d

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26. "Imminent danger" in this context is further defined in Black's Law Dictionary (Rev. Fourth Ed. 1968), as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, . . . such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense" (emphasis added).

74, 78 (1979).[27] Yet, an act in self-defense necessarily occurs on the spur of the moment, arising spontaneously in the face of an imminent danger. **Stoffer v. State**, 14 Ohio St. at 52-53. It is an instantaneous eruption of events, presenting no opportunity to avoid the danger. **State v. Robbins**, 58 Ohio St.2d at 80. The force used by the defender is "immediately necessary for the purpose of protecting [her]self." Model Penal Code § 3.04, p. 478 (1974) (emphasis added).

To prove the element of prior calculation and design, the prosecution necessarily must demonstrate that the defendant's act was not on the spur of the moment (T. 690; A. 14).

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27. The trial court further instructed the jury that prior calculation and design requires "a definite process of reasoning in advance of the killing, which . . . must have included a mental plan, involving studied consideration of the method and the means with which to kill another." (T. 690; A. 14) **See also** Legislative Service Commission Note to R.C. § 2903.01 (1983), requiring "studied care in planning or analyzing the means of the crime, as well as a scheme encompassing the death of the victim" (emphasis added). Prior calculation and design is wholly incompatible with self-defense.

By obliging the defendant to prove she acted in the belief that she was "in imminent danger," about to be killed or to receive great bodily harm (T. 701; A. 20), the Ohio trial court demanded that Earline Martin prove she acted on the spur of the moment. The trial court's instruction thus required her to disprove the essential element of prior calculation and design, and her conviction is violative of due process.

The Ohio Supreme Court stated that Appellant did not dispute the existence of these elements, including prior calculation and design. This is inaccurate. In fact, the Ohio Supreme Court did not independently analyze the relationship between self-defense and the elements of offenses.

The Ohio Supreme Court instead attempted to rely on the characterization of self-defense in **State v. Poole**, 33 Ohio St.2d 18, 19, 294 N.E.2d 888, 889 (1973), as a defense

which "admits the facts claimed by the prosecution." Such reliance is misplaced. **Poole** involved the defense of accident, not self-defense, to a charge of the first degree under the previous murder statute, and simply identified self-defense as such a defense in passing. **State v. Poole**, 33 Ohio St.2d at 19, n. 3. More importantly, all of the cases which **Poole** cited in support of this characterization, and **Poole** itself, were decided before the element of prior calculation and design was legislatively identified and defined. Therefore, **Poole** has no relevance in the determination of the relationship between self-defense and prior calculation and design.

Petitioner Martin is not asking this Court to substitute its own reading of the term 'prior calculation and design' for that of the Ohio legislature or the Ohio courts. The meaning of the term is evident in both the Legislative Service Committee notes and

Ohio decisions. The inconsistency between "prior calculation and design" and self-defense is evident upon the face of the jury instructions in the case at bar. Since prior calculation and design and self-defense so obviously negate one another, the principles of **Mullaney** and **Patterson** require that the judgment of the Ohio Supreme Court be reversed.

Sandstrom v. Montana, 442 U.S. 510 (1979), and **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), also warrant a reversal of Defendant Martin's conviction. "A jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 696, 88 L.Ed.2d 704, 715 (1986) (citing **Sandstrom**).

While the jury received general instructions as to the prosecutor's burden (T. 676, 686-7, 692-693; A. 6, 12, 15), and

the presumption of innocence (T. 676-677; A. 6-7), the jury was also specifically instructed that the burden of proof is upon the Defendant to prove the elements of self-defense by a preponderance of the evidence (T. 699-700, 703; A. 19-20, 21). Prior calculation and design and self-defense are simply irreconcilable circumstances. Ms. Martin's jury was thus faced with clearly contradictory instructions respecting allocation of the burden of persuasion on a crucial element of the offense, prior calculation and design. Such "contradictory instructions as to [an element] create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner," **Francis v. Franklin**, 105 S.Ct. at 1976, shifting the burden of proof from the prosecution to

Defendant Martin.[28]

Informing the jury at several points

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28. While **Sandstrom** and **Francis** both presented instances of unconstitutional burden-shifting by means of a presumption, the same due process test of "the way in which a reasonable juror could have interpreted the instruction" **Sandstrom v. Montana**, 442 U.S. at 514, must apply to jury instructions which, by other devices, are challenged as having the effect of relieving the state of the burden of proof enunciated in **Winship**. This test applies regardless of the device used. "It has been settled law since **Stromberg v. California**, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." **Francis v. Franklin**, 105 S.Ct. at 1976, n. 8. The **Stromberg** principle clearly applies to other burden-shifting devices, although the Court has not yet had an occasion to apply it in a non-presumption context. The issue was presented in **Patterson**. Although this Court concluded its opinion with the statement that "nothing was presumed or implied against Patterson," **Patterson v. New York**, 432 U.S. at 216, this Court had granted review in the absence of a presumptive device to consider whether "burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law" offended the constitution. **Patterson v. New York**, 432 U.S. at 198. The Court sustained Patterson's conviction as no burden-shifting occurred as to an element of the crime because the affirmative defense bore no direct relationship to any element of murder. **Patterson v. New York**, 432 U.S. at 201.

The Court's recent opinion in **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), demonstrates the Court's continued application of the **Stromberg** test to all circumstances where jurors may have been led to unconstitutional, or constitu

that the prosecutor must prove prior calculation and design beyond a reasonable doubt does not cure the due process violation. These instructions at best contradicted the allocation to the defendant of the burden of proof on self-defense. **See Francis v. Franklin**, 105 S.Ct. at 1975, 1976, and **see also Cabana v. Bullock** at 714-715, n. 2. No instructions were provided the jury that would lead them to reconcile the conflicting instructions in a constitutionally permissible manner.

(cont.)

tionally inadequate, decision-making. In **Bullock**, the Court used the **Stromberg** test in ascertaining whether the capitally sentenced Bullock had been found by the jury to have actually killed, attempted to kill or possessed the intent to kill the victim as required by the Eighth Amendment. **See Enmund v. Florida**, 458 U.S. 782 (1982). The Court found that a "fair-minded juror . . . could have understood [the jury instructions] to mean that the jury could find Bullock guilty of capital murder without regard to his intent." **Cabana v. Bullock**, 88 L.Ed. 2d at 714. **Bullock** involved no presumptions, nor burden-shifting, yet the Court applied the **Stromberg** analysis. That same analysis should apply here to a non-presumptive, but burden-shifting, instruction.

The burden-shifting was repetitive and permeated the entire charge. The conflict was inherent throughout the instructions. While the jurors were told to resolve inferences equally consistent with guilt or innocence in favor of the Defendant (T. 681; A. 8), they were at the same time specifically told to convict if the evidence regarding self-defense was in equipoise (T. 703-704; A. 21). On these instructions, the jurors were informed that the state had the burden to prove prior calculation and design beyond a reasonable doubt but what the jurors were not explicitly told was that self-defense could provide that reasonable doubt. Indeed, a reasonable juror may well have believed that Earline Martin had to prove the absence of prior calculation and design by a

preponderance of the evidence to be acquitted.[29]

Finally, the instructions created confusion by yet another conflicting duty. The jurors were instructed: "Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant unlawfully and purposely and with prior

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29. The jurors received a written copy of the instructions (T. 686; A. 11), and therefore had the opportunity to review them. It is possible that some jurors may have disagreed with the judge's instructions that the Defendant must prove her innocence, i.e., that her act was in self-defense. However, it is highly unlikely that such disagreement would have influenced deliberations. The first instruction the jury received was that it was their sworn duty to apply the law as given, and that they "are not permitted to change the law, not to apply your own ideas of what you think the law ought to be" (T. 673; A. 4). One of the last instructions the jury received was that they "not invad[e] [the judge's] area, which is relative to the law (T. 705; A. 22). The jury was also repeatedly admonished not to be "swayed or influenced by considerations such as sympathy" (T. 673; A. 4-5, and see 704; A. 22). Therefore, even if some jurors were possibly unhappy with the law's allocation of burden, they were not permitted the opportunity to act on those concerns.

calculation and design, caused the death of another . . ." (emphasis added) (T. 686; A. 12). The jury was told there was a right of self-defense (T. 702; A. 20-21) and that an act performed in self-defense is "justified" (T. 699, 700; A. 19, 20).

Therefore, the jurors were directed that the prosecution must prove that her act was unlawful, and yet Ms. Martin had to prove her act was justified, i.e., lawful. These instructions are irreconcilable, and a reasonable juror might well reconcile the two by placing the burden of proof on the Defendant to prove her act lawful. This interpretation offends due process, and this Court cannot, on this record, be assured this path was not taken.

III.

DUE PROCESS REQUIRES THAT THE STATE BEAR THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE ACCUSED'S ACTIONS WERE UNLAWFUL AND NOT IN SELF-DEFENSE.

It is axiomatic that the State may not convict and punish an accused for a crime unless it has proved his guilt beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970). This fundamental due process standard was not met in the instant case. The State was not required to prove that Ms. Martin's actions were unlawful and constituted a crime. On the contrary, Ms. Martin was required to prove that she acted lawfully in self-defense.

In **Winship**, 397 U.S. at 363-364, this Court identified several vital interests protected by the reasonable doubt standard: the liberty and good name of the accused; reducing the risk of convictions based on factual error; and commanding the respect and confidence of the community in applications of the

criminal law. As in **Mullaney v. Wilbur**, 421 U.S. at 700, these interests are implicated to a greater degree here. Ms. Martin faced a life sentence and stigmatization as a murderer if convicted. If acquitted, she would be set free. Both the consequences to Ms. Martin and the community's interest in seeing only the guilty punished required that the State prove that she acted unlawfully.

Moreover, requiring Ms. Martin to prove the critical fact in dispute--whether or not she acted in self-defense--increased the likelihood of an erroneous conviction. **Id.**, at 701. This Court held in **Mullaney** that:

> "[s]uch a result contravenes the principle articulated in **Speiser v. Randall**, 357 U.S. 513, 525-526 (1958):"
>
> > '[w]here one party has at stake an interest of transcending value--as a criminal defendant his liberty--th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial . . ." **See also In re Winship,**

397 U.S. at 370-372 (Harlan, J., concurring). **Id.**

See also, Patterson, 432 U.S. at 215.[30] Accordingly, due process requires the State to bear the ultimate burden of persuasion on the issue of self-defense, a fact so critical to culpability.

The practical effect of requiring an accused to prove self-defense by a preponderance of evidence is appalling. Under this burden of proof, Ms. Martin could have received a life sentence when it was as likely as not that she was innocent. As this Court recognized in **Mullaney**, 421 U.S. at 703, this is an intolerable result in a society where "it is far worse to convict an innocent man than to let a guilty man go free." **See Winship**, 397 U.S. at 372 (Harlan, J., concurring). It can only be remedied by requiring

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30. "Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

the State to prove beyond a reasonable doubt that the accused did not act in self-defense. Otherwise, guilt may be found even where there is a reasonable doubt that the defendant's actions were criminal.

Additionally, under Ohio law a jury must decide guilt or innocence based on conflicting and confusing instructions. On the one hand, the jury is told the accused is presumed innocent and the State must prove guilt beyond a reasonable doubt. On the other, the jury is instructed that the defendant is required to prove his claim of self-defense by a preponderance of the evidence. While lawyers may reconcile those instructions, there is

substantial doubt that lay jurors can.[31] Due process demands that the jury clearly understand the proper standard of proof for deciding guilt or innocence. **Sandstrom v. Montana**, 442 U.S. 510 (1979); **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); **Cabana v. Bullock**, 474 U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Indeed, the overwhelming number of jurisdictions in the United States have recognized this fact and require the state to bear the burden of proof upon the issue of self-defense. **See** cases summarized in the Appendix

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31. **See** Comment, "Shifting the Burden of Proving Self-Defense--With Analysis of Related Ohio Law," 11 Akron L. Rev. 717, 744 (1978). Several courts have held similar instructions placing the burden of proof on the issue of self-defense on the defendant to be conflicting and confusing. **See Thomas v. Leeke**, 725 F.2d 246 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 218 (1984); **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986), **reh. en banc granted**, ___ F.2d ___; **State v. Millet**, 273 A.2d 504 (Maine 1971), and cases cited therein; **Leonard v. People**, 369 P.2d 54 (Colorado 1962); **Lester v. State**, 121 So.2d 110 (Alabama 1960); **see also Cherry v. Jago**, 722 F.2d 1296 (6th Cir. 1983) (Jones, J., dissenting) **cert. denied**, ___ U.S. ___, 104 S.Ct. 3518 (1984).

to this brief at A-4. Placing the burden on the State to prove the absence of self-defense has the virtue of relative simplicity and comports with **Winship**. **See State v. Millet**, 273 A.2d at 507.

If this Court is to remain true to the principles of **Winship**, it cannot countenance the conviction in this case under a lesser standard of proof. The State cannot be permitted to deprive the accused of her liberty and good name without being required to prove that her actions were unlawful. Actions taken in self-defense are not a crime. Before the State may punish an accused, she must be shown to be morally blameworthy. **See** Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases," 77 Yale L.J. 880, at 890, 911 (1968). This is fundamental to basic notions of due process.

Further, to require the accused to prove her innocence on the "critical fact in

dispute" compounds the **Winship** violation. It not only conflicts with the overriding presumption of innocence, but increases the risk that an innocent person will be convicted. **Mullaney v. Wilbur**, 421 U.S. at 701. It is certainly not a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." **Addington v. Texas**, 441 U.S. 418, 423 (1979). As this court said in **Winship**, 397 U.S. at 364:

> "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

Such doubt pervades the instant case.

CONCLUSION

Because an act taken in self-defense is innocent conduct which is protected by the United States Constitution, the State cannot require an accused to bear the burden of proof on that issue because to do so would require the accused to prove her innocence in violation of the principle announced in **In re**

Winship. Equally as important, a functional analysis demonstrates that proof of self-defense necessarily negates several ingredients of the crime which the State must prove in order to establish guilt beyond a reasonable doubt. Consequently, the principles announced in **Mullaney** and **Patterson** prohibit the placement of the burden of proof upon the issue of self-defense on the accused.

Accordingly, the judgment of the Ohio Supreme Court below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Brief for Ohio Public Defender Commission As **Amicus Curiae** In Support Of Petitioner were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
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A P P E N D I X

FEDERAL CASES TREATING STATE LAW WITH RESPECT TO SELF-DEFENSE AND THE BURDEN OF PROOF

Fourth Circuit

Guthrie v. Warden, 683 F.2d 820 (4th Cir. 1982) [Maryland law: self-defense exonerates an accused of any degree of culpable homicide].

Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), **cert. denied**, 444 U.S. 950 (1979) [North Carolina law: self-defense negates unlawfulness].

Sarah Thomas v. William D. Leeke, 725 F.2d 246 (4th Cir. 1983), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.Ed.2d 148 (1984). Though the decision in this case is based upon a finding of confusion between the instructions upon the state's burden to prove guilt beyond a reasonable doubt and the defendant's burden to prove self defense, it is clear that the underlying problem was that the Court found self-defense to be inconsistent with guilt.

Frazier v. Weatherholtz, 572 F.2d 994, 995 (4th Cir. 1978), **cert. denied**, 439 U.S. 876 (1978) [Virginia law: no infirmity in requiring defendant to establish self-defense "to the extent of raising . . . a reasonable doubt as to whether or not he acted in the lawful exercise of such right"]; **Baker v. Muncy**, 619 F.2d 327 (4th Cir. 1980) [Virginia law: following **Frazier**]. **See** discussion of **Frazier** in **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986) at 1187-1189 (J. Murnaghen) (pending for rehearing **en banc**); **cf.** 1194 (J. Sneeden, dissenting).

Fifth Circuit

Tennon v. Ricketts, 642 F.2d 161 (5th Cir. 1981) [Georgia law: self-defense negates unlawfulness]; **McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981) [Georgia law: self-defense negates unlawfulness].

Sixth Circuit

Compare Carter v. Jago, 637 F.2d 449 (6th Cir. 1980), **cert. denied**, 456 U.S. 980 (1982); **Thomas v. Arn**, 704 F.2d 865 (6th Cir. 1983); **Nieb v. Jago**, 695 F.2d 228 (6th Cir. 1982), **cert. denied**, 463 U.S. 1210; **Jones v. Jago**, 701 F.2d 45 (6th Cir. 1983), **cert. denied**, 464 U.S. 914; **Long v. McKeen**, 722 F.2d 286 (6th Cir. 1983), **cert. denied**, 465 U.S. 1106 (1984); **Melchior v. Jago**, 723 F.2d 486 (6th Cir. 1983), **cert. denied**, 466 U.S. 952 (1984) (Contie, J., concurring), **White v. Arn**, 788 F.2d 338 (6th Cir. 1986), **petition for writ of certiorari pending**, and **Wilson v. McMacken**, 786 F.2d 216 (6th Cir. 1986), rejecting arguments similar to those presented in the instant case **with Hooper v. Perini**, 641 F.2d 445, 446 (6th Cir. 1981), **cert. denied**, 454 U.S. 817; **Thomas v. Arn**, 704 F.2d 865, 876, n. 13 (6th Cir. 1983) [indicating that self-defense negated the malice element under the pre-1974 Ohio murder statute] and **Isaac v. Engle**, 646 F.2d 1129, 1136 (6th Cir. 1980) (**en banc**) (Edwards, C.J., concurring), **rev'd on other grounds sub nom. Engle v. Isaac**, 456 U.S. 107 (1984). It should also be noted that in **Webster v. Engle**, 721 F.2d 566, 569 (6th Cir. 1983), and **Melchior v. Jago**, 723 F.2d 486, 492 (6th Cir. 1984), **cert. denied**, 466 U.S. 952, it was indicated that the question of whether it was unconstitutional to place the burden of proof on the issue of self-defense was one which

was "open" and still not resolved within the Circuit.

Eleventh Circuit

See Lamb v. Jernigan, 683 F.2d 1332, 1336 (11th Cir. 1982), **cert. denied**, 460 U.S. 1024 (1983) [Georgia law: self-defense negates malice] (**dicta**).

BURDENS OF PROOF ON SELF-DEFENSE IN VARIOUS STATES

Type A: The defendant has no burden other than the assertion of self-defense, as the absence of self-defense is considered an element of the offense.

Type B: The defendant has the burden of going forward with the evidence showing self-defense. The quality of the evidence required varies from state to state. The range is "some credible evidence" to "evidence sufficient to create a reasonable doubt in the minds of the jurors." Once the defendant has met this burden of production, the state must show the absence of self-defense or the defendant is acquitted.

Type C: In order to be acquitted, the defendant must prove by a preponderance of the evidence that he acted in self-defense.

AUTHORITIES FOR BURDENS OF PROOF IN THE VARIOUS STATES

TYPE A

Louisiana	**State v. Brown**, 414 So.2d 726 (Ia. 1982); **State v. Buchanan**, 439 So.2d 576 (So. App. 1983)
Oregon	Oregon Revised Statutes §§ 161.055, 161.190 and 161.209

TYPE B

Alabama	**Henson v. State**, 112 Ala. 41, 21 So. 79 (1896), **overruled on other grounds, McGhee v. State**, 178 Ala. 4, 59 So. 573 (1912); **Lester v. State**, 121 So.2d 110 (Ala. 1960); **Ex Parte Allen Johnson**, 433 So.2d 479 (Ala. 1983).
Alaska	Alaska Statutes §§ 11.81.330, 11.81.335, 11.81.300, 11.81.900(15); **Brown v. State**, 698 P.2d 671 (Alaska Ct. App. 1985); **Weston v. State**, 682 P.2d 1119 (Alaska 1984).

TYPE B (con't)

Arizona	**State v. Hunter**, 142 Ariz. 88, 688 P.2d 980 (1984); **State v. Saurevathong**, 130 Ariz. 461, 636 P.2d 1243 (Ariz. App. 1981).
Arkansas	Arkansas Statutes Annotated §§ 41-110(3), 41-506, 41-507; **Peals v. State**, 266 Ark. 410, 584 S.W.2d 1 (1979).
California	**People v. Adrian**, 134 Cal. App.3d 443, 184 Cal. Rptr. 592 (Ct. App. 1982), **on rehearing**, 135 Cal. App.3d 335, 185 Cal. Rptr. 506 (Ct. App. 1982).
Colorado	Colorado Revised Statutes §§ 18-1-407 and 18-1-704.
Connecticut	Connecticut General Statutes Annotated §§ 53a-19, 53a-16, 53a-12; **State v. Hardwick**, 1 Conn. App. 609, 475 A.2d 315 (Conn. App. 1984).
Delaware	Delaware Code Annotated §§ 11-464, 11-461, 11-303.

TYPE B (con't)

Dst. of Columbia	No dispositive authority.
Florida	**Brown v. State**, 454 So.2d 596 (Fla. App. 1984).
Georgia	**Walden v. State**, 251 Ga. 505, 307 S.E.2d 474 (Ga. 1983).
Hawaii	Hawaii Revised Statutes §§ 703-301, 701-115(2)(a), and 703-304; **State v. Sanchez**, 636 P.2d 1365 (Hawaii App. 1981); **State v. Reclina**, 616 P.2d 229 (Hawaii App. 1980).
Idaho	**State v. Jurko**, 245 P. 685 (1926).
Illinois	Illinois Revised Statutes Chapter 38, §§ 7-1 and 3-2.
Indiana	**Clark v. State**, 159 Ind. 60, 64 N.E. 589 (1902); **Lawson v. State**, 171 Ind. 431, 84 N.E. 974 (1908); **McCann v. State**, 466 N.E.2d 421 (Ind. 1984).

TYPE B (con't)

Iowa	**State v. Sharkey**, 311 N.W.2d 68 (1981); **State v. Overstreet**, 243 N.W.2d 880 (1976).
Kansas	**State v. Smith**, 161 Kan. 230, 167 P.2d 594 (1946); **State v. Beard**, 220 Kan. 580, 552 P.2d 900 (1976).
Kentucky	Kentucky Revised Statutes §§ 503.050 and 500.070(1).
Maine	Maine Revised Statutes Annotated Chapter 17A §§ 108 and 101(1); **State v. Lagasse**, 410 A.2d 537 (Me. 1980).
Maryland	**Squire v. State**, 280 Md. 132, 368 A.2d 1019 (1977); **State v. Evans**, 278 Md. 197, 362 A.2d 629 (1976).
Massachusetts	**Commonwealth v. Kamishlian**, 21 Mass. App. 931, 486 N.E.2d 743 (Mass. App. 1985); **Commonwealth v. Rodriguez**, ___ Mass. ___, 352 N.E.2d 203 (1976).

TYPE B (con't)

Michigan	**People v. Coughlin**, 65 Mich. 704, 32 N.W. 905 (Mich. 1887); **People v. Stallworth**, 364 Mich. 528, 111 N.W.2d 742 (Mich. 1961); **People v. Norwood**, 333 N.W.2d 255 (Mich. App. 1983).
Minnesota	**State v. McPherson**, 114 Minn. 498, 131 N.W. 645 (1911); **State v. Graham**, 371 N.W.2d 204 (Minn. 1985).
Mississippi	**Ford v. State**, 73 Miss. 734, 19 So. 665 (1896); **Hampton v. State**, 99 Miss. 176, 54 So. 722 (1911).
Missouri	Missouri Revised Statutes §§ 563.031 and 556.051.
Montana	**State v. Lopez**, 185 Mont. 187, 605 P.2d 178 (1980); **State v. Grady**, 166 Mont. 168, 531 P.2d 681 (1975); Montana Code Annotated § 45-3-115 (1984).
Nebraska	**State v. Samuels**, 205 Neb. 585, 289 N.W.2d 183 (1980).
Nevada	**St. Pierre v. State**, 96 Nev. 888, 620 P.2d 1240 (1980); **Kelso v. State**, 95 Nev. 37, 588 P.2d 1035 (1979).

TYPE B (con't)

New Hampshire	New Hampshire Revised Statutes Annotated §§ 626: 7(I)(a) and 627: 4(II)(a).
New Jersey	**State v. Gardner**, 51 N.J. 444, 242 A.2d 1 (1968); **State v. Chiarello**, 69 N.J. Super. 479, 174 A.2d 506 (1961).
New Mexico	**State v. Martinez**, 95 N.M. 421, 622 P.2d 1041 (1981); **State v. Cochran**, 78 N.M. 292, 430 P.2d 863 (1967).
New York	New York Penal Law 25.00, 35.00, and 35.10 (McKinney 1965).
North Carolina	**State v. Herbin**, 298 N.C. 441, 259 S.E.2d 263 (1979); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975).
North Dakota	**State v. Hazlet**, 16 N.D. 426, 113 N.W. 374 (1907).
Oklahoma	**Cottrel v. State**, 458 P.2d 328 (1969).

TYPE B (con't)

Pennsylvania	**Commonwealth v. Schaller**, 493 Pa. 426, 426 A.2d 1090 (1981); **Commonwealth v. Black**, 376 A.2d 627 (1977).
Rhode Island	**In re Doe**, 390 A.2d 920 (1978).
South Dakota	**State v. Reddington**, 80 S.D. 390, 125 N.W.2d 58 (1963); **State v. Wilcox**, 48 S.D. 289, 204 N.W. 369 (1925).
Tennessee	**Henley v. State**, 520 S.W.2d 361 (1974); **Myers v. State**, 185 Tenn. 264, 206 S.W.2d 30 (1947).
Texas	**Luck v. State**, 588 S.W.2d 371 (1979).
Utah	**State v. Torres**, 619 P.2d 694 (1980).
Virginia	**McGhee v. Commonwealth**, 219 Va. 560, 248 S.E.2d 808 (1978); **Frazier v. Weatherholz**, 572 F.2d 994 (4th Cir. 1978).

TYPE B (con't)

Washington	**State v. McCullum**, 98 Wash.2d 484, 656 P.2d 1064 (1983); **State v. Hanton**, 94 Wash.2d 129, 614 P.2d 1280 (1980).
West Virginia	**Bowman v. Leverette**, 289 S.E.2d 435 (1982); **State v. Kirtley**, 252 S.E.2d 374 (1978).
Wisconsin	**State v. Staples**, 99 Wis.2d 364, 299 N.W.2d 270 (1980).
Wyoming	**Schiekofsky v. State**, 636 P.2d 1107 (1981); **Loy v. State**, 26 Wyo. 381, 185 P. 796 (1919).

TYPE C

Ohio	Ohio Revised Code § 2901.05(A) (1982).
South Carolina	**State v. Bolton**, 266 S.C. 444, 223 S.E.2d 863 (1976).